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BUDD

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CIVIL REMEDIES

UNDER THE

CODE SYSTEM

With Forms Applicable to Civil Actions.

BY

JOSEPH H. BUDD

ATTORNEY AT LAW

AND ONE OF THE JUDGES OF THE SUPERIOR COURT

OF THE

STATE OF CALIFORNIA

IN THE COUNTY OF SAN JOAQUIN

LOS ANGELES, CAL.

CHAS. W. PALM CO.

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PREFACE.

It is more than one hundred and fifty years since Blackstone wrote his commentaries on the laws of England.

The third volume of that work was written respecting the laws of civil remedies as they then were; but since these commentaries were written, such laws have been changed very materially, both in England and in this country. The most material of such changes has been made in the states, which have adopted the code system of civil remedies.

In writing this work I have taken the Code of Civil Procedure of the state of California as my principal guide respecting the law of civil remedies under the code system. I have in a portion of the work stated some of the principal rules of evidence as they now are in most of the states, and I have written several hundred forms for use in actions and civil proceedings; and these forms are included in an appendix to the work.

JOSEPH H. BUDD.

Stockton, January, 1902.

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CHAPTER I.

OF THE REMEDIES FOR THE REDRESS OF PRIVATE WRONGS BY THE MERE ACT OF THE PARTIES.

A private wrong is an infringement on, or a privation of, the private or civil rights belonging to an individual, considered as an individual.[1]

The redress and prevention of private wrongs may be by the mere acts of the parties when such redress and prevention are sanctioned by law; but the more effectually to accomplish such redress and prevention, courts of justice are instituted for the prevention and redress of such wrongs, by suits or actions in such courts.[2]

The following are cases under our law in which the prevention and redress of private wrongs may be by the acts of the parties:

1. The defense of one's self, or the mutual and reciprocal defense of such as stand in the relation of husband and wife, parent and child, master and servant. In these cases, if the party himself, or any of these his relations, be forcibly attacked in his person or property, it is lawful for him to repell force by force, and the breach of the peace which happens is chargeable upon him only who began the affray; but care must be taken that the resistance does not exceed the bounds of mere defense and prevention, for if it does, the defender would himself become an aggressor.[3]

2. Recaption is another species of remedy by the mere act of the party injured. This happens when any one hath deprived another of his property in goods, or chattels personal, or wrongfully detains one's wife, child or servant; in which case the owner of the goods, and the husband, parent or master, may law-

1. 3 Bl. Com. 3.
2. 3 Bl. Com. 5.
3. 3 Bl. Com. 6.

fully claim and retake them wherever he happens to find them, so it be not in a riotous manner, or attended with a breach of the peace. If, for instance, a man's horse be taken away, and he finds him in a common, a fair, or a public inn, he may lawfully seize him to his own use; but he cannot lawfully, for such purpose, break open a private stable, or enter on the grounds of another, unless the horse has been feloniously stolen, but must have recourse to an action at law.[4]

A person may, however, enter on the lands of a wrongdoer and take his chattels therefrom which have been placed there by such wrongdoer, if it can be done peaceably.[5]

It has been held that the owner of goods may lawfully enter on the lands of another to take his own property peaceably in all cases, when he is not himself in fault for their being there; but the weight of authority is that the mere fact that a person owns a chattel gives him no right to go upon the land of another person to obtain possession of it.[6]

When, however, neither party has placed the goods on the land, nor is in fault for their being there; and especially when the act of God, in the form of a tempest or inundation has been the sole cause, the high authority of Judge Story in his work on Bailments 83 a, and that of Mr. Bigelow in his work on Torts, p. 196, is in favor of the owner's right to enter in such case and remove his property.

3. An owner of real estate, and who is entitled to its possession, may enter on and take possession thereof, if it can be done peaceably and without force, when another person without any right has taken possession thereof.[7]

There are but few cases in which this remedy can be used.

4. A fourth species of remedy by the mere act of the party is the abatement or removal of nuisances.

Any person may abate a private nuisance, and may abate a public nuisance if specially injurious to him, by removing, or if necessary, destroying the thing, which constitutes the nuisance, if

4. 3 Bl. Com. 7.
5. Wheeden v. Lowell, 50 Me. 504.
6. Roach v. Damerson, 2 Humph. 425.
7. 3 Bl. Com. 8.

done without committing a breach of the peace, or doing unnecessary injury.[8]

5. The owner of land has the right to distrain another's cattle damage feasant, that is, doing damage, or trespassing on his land.

This distraining of cattle, damage feasant, is regulated in this country by legislative enactments.

Of the five cases in which the distraining of property was permissible at common law, distress damage feasant alone remains in common use in the United States.

6. ACCORD AND SATISFACTION. Accord is an agreement between parties as to the terms of compromise or settlement, and satisfaction is the performance thereof by payment or otherwise, and such satisfaction is a bar to all actions upon matters embraced within the terms of such compromise or settlement.[9]

7. ARBITRATION AND AWARD. An arbitration is an agreement between parties submitting a matter or matters in dispute between them, concerning any personal chattels or personal wrong, to the judgment of one or more arbitrators who are to decide the controversy, and such decision of the arbitrators is called an award; and by such award the questions submitted are as fully determined, and the right transferred or settled, as it could have been by the agreement of the parties, or the judgment of a court of justice.

Formerly it was usual to have in the submission that, if the arbitrators, if there were more than one, did not agree, another person was to be called in as umpire, to whose sole judgment it was then referred, and his decision was the award.[10]

The right to real property cannot pass by a mere award. The arbitrators, however, can award that one of the parties to the submission shall transfer to the other, the title to real estate, if such part of the award be within the terms of the submission.[11]

In California there may be submission by parties to arbitrators, and an award as to any controversy which might be the subject of a civil action between them, except a title to real prop-

8. Cooley on Torts 46, 48.
9. 3 Bl. Com. 20.
10. 3 Bl. Com. 21.
11. Blair v. Wallace, 21 Cal. 318.

erty, but that qualification does not include questions which relate merely to the partition or boundaries of real property.[12]

A submission to arbitrators was at common law revocable before an award was made; and formerly it was the practice of the parties to the submission to enter into mutual bonds with condition to stand to the award or arbitration of the arbitrators named therein.[13]

By the statutes of California it may be stipulated in the submission, that such submission be entered as an order of the Superior Court, and when so entered, the submission cannot be revoked without the consent of both parties; and the arbitrators may be compelled to make an award, and the award may be enforced by the court in the same manner as a judgment.[14]

When the submission is entered as an order of the court, the court may on motion vacate the award on either of the following grounds:

First. That it was procured by corruption or fraud;

Second. That the arbitrators were guilty of misconduct or committed gross error in refusing, on cause shown, to postpone the hearing, or in refusing to hear pertinent evidence, or otherwise acted improperly in a manner by which the rights of the party were prejudiced;

Third. That the arbitrators exceeded their powers in making the award; or that they refused or improperly omitted to consider a part of the matter submitted to them; or that the award is indefinite or cannot be performed.[15] And the court may, on motion, modify or correct the award where it appears:

1. That there was a miscalculation in the figures upon which it was made, or that there was a mistake in the description of some person or property therein;

2. When a part of the award is upon matters not submitted, which part can be separated from other parts, and does not effect the decision on the matters submitted;

3. When the award, though imperfect in form, could have been amended if it had been a verdict, or the imperfection disregarded.[16]

12. Code of Civil Procedure, Sec. 1281.
13. 3 Bl. Com. 22.
14. Code of Civil Procedure, Sec. 1283.
15. Code of Civil Procedure, Sec. 1287.
16. Code of Civil Procedure, Sec. 1288.

8. A sale of pledged or mortgaged property. At common law, upon default of the pledgor, the pledgee could sell at public auction the chattel pledged upon giving the pledgor reasonable notice to redeem and a reasonable notice of the time and place of such sale; such notice, however, need not be given if, by agreement of the parties, notice of the time and place of sale has been expressly or impliedly waived.[17]

A person who deposits property as a pledge may agree that such property may be sold at the option or pleasure of the pledgee, and in such case a sale of the property pledged is good, without previous demand of payment or notice of the time and place of sale.[18]

When the pledgor gives to the pledgee power to sell the thing pledged, a sale may be made according to the rules of common law, unless the conditions prescribed in the power of sale are imperative. But both the common law form of procedure, and that which the parties have agreed upon must yield to statutory regulations, when these are imperative and not permissive merely.[19]

A pledgee cannot sell any evidence of debt pledged to him except the obligations of governments, states or corporations; but he may collect the same when due.[20]

A mortgagee of chattels was, at common law, and is in most of the states, after forfeiture, the absolute owner of the mortgaged chattel, and could sell the same at private sale and confer upon the purchaser a good title to it, although the mortgage contains provisions for the selling of the property at auction and the payment of the surplus to the mortgagor; and could, in the absence of statutory requirements on the subject, cut off the right of redemption by a sale of the property upon reasonable notice to the mortgagor: just as a pledgee may sell property held on pledge upon giving reasonable notice to the pledgor of the time and place of the sale.[21]

In Michigan, North Dakota and Oregon, and in California

17. Jones on Pledges, Sec. 602, 607, 610.
18. Hyatt v. Argenti, 3 Cal. 151.
19. Jones on Pledges, Sec. 602.
20. Civil Code, Sec. 3006.
21. Jones on Chattel Mortgages, Sec. 707; Wilson v. Brannan, 27 Cal. 271.

since the adoption of the codes in that state, the title of the mortgagee of a chattel, to such mortgaged chattel, does not become absolute until he has done some act equivalent to a foreclosure.

Since the adoption of the codes in California a mortgagee of personal property, where the debt to secure which the mortgage was executed becomes due, may foreclose the mortgagor's right of redemption by a sale of the property made in the manner and upon the notice prescribed by the title on "pledge" in the Civil Code, or by proceedings under the Code of Civil Procedure of that state.[22]

A power of sale may be given in a mortgage to the mortgagee, or to any other person, to be exercised after a breach of the obligation for which the mortgage was given as security.[23]

Such power of sale is to be deemed a part of the security, and vests in any person who by assignment becomes entitled to the money secured to be paid by the mortgage.[24]

A pledgee's assignee has the same right to sell the pledge, upon reasonable notice after default, that the pledgee himself had.[25]

A sale of mortgaged real estate under a power of sale contained in the mortgage, must be made on the notice of sale and in the manner prescribed in the mortgage.[26]

A deed of trust of land, authorizing a trustee, on default of the payment of the debt specified in the deed of trust to sell and convey the land therein described, is not a mortgage requiring foreclosure, but it is a conveyance of the legal title to the land to the trustee.[27]

A person to whom the debt specified in the deed of trust is payable may be the trustee to sell and convey the property.[28]

When a deed of trust of real and personal property is given to a creditor as security for advances made and to be made, such deed of trust is in effect only a mortgage with a power of sale, and the grantee may treat it as such, and instead of making a sale

22. Civil Code, Sec. 2967.
23. Civil Code, Sec. 2932.
24. Civil Code, Sec. 858; Jones on Chattel Mortgages, Secs. 826, 1789.
25. Jones on Pledges, Sec. 605.
26. Jones on Chattel Mortgages, Sec. 1821 et seq.
27. Grant v. Burr, 54 Cal. 298.
28. More v. Calkins, 95 Cal. 435.

under the power, may go into a court of equity for a foreclosure and sale under its decree; and when such course is pursued, his relation to the property is the same as that of the mortgagee in the foreclosure of an ordinary mortgage; and the court may, in its decree for the sale of the property, when such sale is by officers appointed by the court, authorize the creditor named in the deed of trust to become a purchaser at such sale.[29]

Blackstone in his commentaries mentions two remedies under the laws of England, by the mere operation of law, but such remedies do not exist under the laws of this country.

29. Felton v. Le Breton, 92 Cal. 457.

CHAPTER II.

OF COURTS OF JUSTICE.

Blackstone defines a court to be a place wherein justice is judicially administered;[1] and states that in every court there must be at least three constituent parts, that is the *actor, reus* and *judex,* the *actor,* or plaintiff, who complains of the injury done; the *reus,* or defendant, who is called upon to make satisfaction for it; and the *judex,* or judicial power, which is to examine the truth of the fact, and if any injury appears to have been done, to ascertain, and by its officers, to apply the remedy.[2]

A court of record at common law was one where the acts and judicial proceedings were enrolled in parchment for a perpetual memorial and testimony, and which rolls were called the records of the court, and they were of such high and super-eminent authority that their truth could not be called in question; and if the existence of such record was denied, it could be tried by nothing but the record itself.[3]

The three principal courts of record in England were, at the time Blackstone wrote his commentaries, the Court of Common Pleas, the Court of the King's Bench, and the Court of Exchequer. A fourth court was the High Court of Chancery, out of which original writs issued.

This High Court of Chancery had jurisdiction in cases in equity.

A fifth court was the Court of Exchequer Chamber, which had no original jurisdiction, but was a court of appeals to correct the errors of other jurisdictions.[4]

The House of Peers was the Supreme Court of Judicature

1. 3 Bl. Com. 35.
2. 3 Bl. Com. 37.
3. 3 Bl. Com. 36.
4. 3 Bl. Com. 76.

in England, having no original jurisdiction over causes, but it only had jurisdiction of causes upon appeals and writs of error.[5]

Besides the courts which I have mentioned there were then in England, courts having jurisdiction of maritime cases, and ecclesiastical courts which had jurisdiction of matters of divorce and alimony, the probate of wills, and the administration on the personal estates of deceased persons. There were then in England other courts which were of inferior and limited jurisdiction; but an enumeration of such inferior courts would be of no practical utility in this country.

The principal courts of justice of the United States are the senate of the United States as a court for the trial of impeachments, the Supreme Court, Appellate Courts, Circuit Courts, District Courts, Territorial Courts, Supreme Court of the District of Columbia and Court of Claims.

Under the constitution of the United States the judicial power of the United States is vested in one Supreme Court, and in such inferior courts as the congress may, from time to time, ordain and establish.[6]

The judicial power of a state is vested in the courts designated by the constitution of the state, and in such other courts as the state constitution may authorize the legislature of the state to ordain and establish.

In California the judicial power of the state is vested in the senate, sitting as a Court of Impeachment, in a Supreme Court, Superior Courts, Justices of the Peace and such inferior courts as the legislature may establish in any incorporated city, or town, or city and county.[7]

The Supreme Court of that state has appellate jurisdiction in all cases in equity, except such as arise in justices' courts; also in all cases at law which involve the title or possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine, or, in which the demand exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars; also in cases of forcible entry and detainer, and in proceedings in insolvency, and in actions to prevent or abate a

5. 3 Bl. Com. 77.
6. U. S. Const. Art. III, Sec. 1.
7. California Constitution, Art. VI, Sec. 1.

Congress cannot confer jurisdiction on a state court.[11]

An inferior court ordained and established by congress has such jurisdiction as congress within the limits I have stated above may confer on it.

The state legislature cannot confer on an inferior court which the state legislature has established, jurisdiction as to a matter which deprives a state court of the jurisdiction as to such matters conferred on it by the state constitution.

State courts can exercise concurrent jurisdiction with federal courts in cases arising under the constitution and the laws of the United States, when such jurisdiction of the state courts is not excluded by express provision or by incompatibility in its exercise arising from the nature of the particular case.[12]

Provision is made in the United States statute law for the transferring of certain cases in which state courts have concurrent jurisdiction with the United States Courts, to the United States Courts;[13] unless so transferred the judgment of the state court in the case is conclusive until reversed on appeal or writ of error.

A state court has no jurisdiction to enforce a maritime lien against a vessel by an action in rem; but such maritime lien against a vessel may be waived and a personal action may be brought in a state court against the owner of a vessel to recover a debt or damages for which he is personally liable.[14]

When congress passes a bankrupt law state insolvency laws on the same subject are suspended; but where a state court has acquired jurisdiction under a state law of a case of insolvency, and is engaged in settling the debts and distributing the assets of the insolvent before or at the date the bankrupt law goes into effect, the state court may proceed with the case to its final conclusion, and its action in the matter will be as valid as it would have been if no law upon the subject had been passed by congress.[15]

Upon the repeal of the bankrupt law the state insolvency law becomes operative and applies to debts contracted during its suspension.[16]

11. Ex parte Knowles, 5 Cal. 301.
12. Claflin v. Houseman, 93 U. S. 136.
13. U. S. Rev. Stat., Secs. 639, 647.
14. The Hine v. Trevor, 4 Wall. 556, 7 Wall. 624.
15. Martin v. Berry, 37 Cal. 208.
16. Smith v. His Creditors, 59 Cal. 267.

CHAPTER III.

OF ATTORNEYS AT LAW.

Attorneys at law are officers of the respective courts in which they are admitted to practice as such attorneys.

They should be virtuous, learned and sworn to do their duty.

In most, if not all the states, there are statutory provisions respecting the admission of attorneys to practice as such in the courts of the state.

In California every applicant for admission as an attorney and counsellor at law in the courts of record of that state must produce satisfactory testimonials of good moral character to the Supreme Court of that state, and must undergo a strict examination in open court or before three supreme court commissioners as to his qualifications.

If the Supreme Court be satisfied after such examination that the applicant has the required qualifications, an order will be entered to that effect upon the records of the court, and a certificate of such record, with a certificate of his oath of office as an attorney indorsed on the certificate of such record, will be his license to practice as an attorney and counsellor at law in all the courts of the state.

The Supreme Court of that state can upon evidence of good moral character, and upon the production of a license to practice as an attorney at law in the highest court in another state, admit the person having such license to practice as an attorney at law in that state.

Attorneys at law have most important duties to perform for their clients in actions and proceedings in courts of justice in which their clients are parties.

It is the duty of an attorney and counsellor at law:

To counsel or maintain such actions, proceedings or defenses only as appear to him legal or just, except the defense of a person charged with a public offense.

To employ for the purpose of maintaining the cases confided to him, such means only as are consistent with truth, and never seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.

To maintain inviolate the confidence, and at every peril to himself, to preserve the secrets of his clients.

To abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he is charged.

He is not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest.

He is never to reject for any consideration personal to himself the cause of the defenseless or the oppressed.[1]

The duty of an attorney to his client is not limited to proceedings on behalf of his client in courts of justice. He should advise his client correctly and use his best efforts to effect a compromise and settlement of matters in controversy when such compromise and settlement would be for the best interest of his client.

An attorney at law has authority:

To bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk or entered upon the minutes of the court and not otherwise.

To receive money claimed by his client in an action or proceeding during the pendency thereof, or after judgment, unless a revocation of his authority is filed, and upon the payment thereof, and not otherwise, to discharge the claim or acknowledge satisfaction of the judgment.[2]

An attorney having represented his client in the prosecution of a suit should not render assistance to the adverse side.[3]

The statutes of California provide for the substitution of attorneys in a case, and for the removal or suspension of attorneys.[4]

1. Code of Civil Procedure, Sec. 282.
2. Code of Civil Procedure, Sec. 283.
3. Valentine v. Stewart, 15 Cal. 387.
4. Code of Civil Procedure, Secs. 284, 287.

CHAPTER IV.

OF ACTIONS AT LAW AND SUITS IN EQUITY.

At the time Blackstone wrote his commentaries on the laws of England the redress or prevention of injuries by courts of justice was principally by actions at law in what were designated the common law courts and by suits in equity in courts designated as courts of equity.

Actions at law were designated as actions personal, real and mixed.

Personal actions were such whereby a man claims a debt, or personal duty, or damages in lieu thereof, and likewise whereby a man claims a satisfaction in damages for some injury done to his person or property. The former were said to be founded on contracts, the latter upon torts or wrongs.

Real actions were those which concerned real property only, and were such whereby the plaintiff, called the demandant, claimed title to have any lands, or tenements, rents, commons, or other hereditaments, in fee simple, fee tail, or for a term of life.

Mixed actions partook of the nature of the other two, wherein some real property was demanded, and also personal damages for a wrong sustained.[1]

In the common law courts of record, in theory at least, an action was commenced by what was called an original writ issued out of the Court of Chancery and which defined and determined the form.[2]

Personal actions were in form ex-contractu, or in form of ex-delicto, or in other words they were for breach of contract or for wrongs unconnected with contracts. Those upon contract were principally assumpsit, debt, covenant and detinue, and those for wrongs were case, trover, replevin and trespass *vi et armis.*[3]

1. 3 Bl. Com. 117, 118.
2. 1 Chitty Pl. 107.
3. 1 Chitty Pl. 111.

The action of ejectment was a mixed action. The action of assumpsit was an action for the recovery of damages for the non-performance of a parol or simple contract. The action of debt was for the recovery of a debt *eo nomine.*

The action of covenant was for the recovery of damages for the non-performance of a contract under seal.

The action of detinue was for the recovery of a personal chattel in specie, and it could be used to obtain the delivery of goods in pursuance of the terms of a bailment of the goods.

The action of case was to recover damages for torts not committed with force.

The action of trover or trover and conversion was for the recovery of damages for the conversion of personal property.

The action of replevin was for the possession of personal property wrongfully withheld by the defendant at the commencement of the action.

The action of trespass was to recover damages for injury committed by force.

The remedy of the plaintiff in an action for the possession of real property was the recovery of such possession.

The remedy of the plaintiff in a personal action was principally the recovery of a debt, or of damages for the breach of contract, or the recovery of specific personal chattels, or of damages for the conversion thereof, or for the recovery of damages for some injury to the person to personal property or to real property of the plaintiff, and of money as a compensation for detaining from plaintiff the possession of his property.

The remedy of the plaintiff in mixed actions was the specific recovery of real property and also a satisfaction in damages for an injury thereto, and for damages for the withholding the possession thereof.[4]

In these common law actions issues of fact in the actions were decided by the verdict of a jury.

In suits of equity issues of fact were decided by the court.

In these common law actions, the testimony or deposition of the witnesses was given in open court.

In suits in equity at the time Blackstone wrote his commen-

4. 1 Chitty Pl. 110.

taries, no witnesses were sworn and examined in open court, but the testimony given by witnesses was taken down in writing by the proper officer, and was afterwards submitted to the court.

In these common law actions the testimony of a party to the action, or of a person pecuniarily interested in the result of the action, could not be given or used in the trial of the action.

In suits of equity, when the bill in equity was for discovery, the party defendant was required to answer under oath the interrogatories contained in the bill and addressed to him.

In these common law actions the only relief, as I have before stated, which could be given by the judgment of the court, was the recovery of a debt of specific real or personal property, or the recovery of money as a satisfaction in damages for a breach of contract, or for some injury to person or to property, and for damages for retaining or withholding the property. Such was the principal relief obtained by judgments in common law actions.

The judgments or decrees of courts of equity give remedies for the redress or prevention of private injuries which the common law courts could not give.

Blackstone in his commentaries says that "The rules of decision are in both courts equally opposite to the subject of which they take cognizance.

"Where the subject matter is such as requires to be determined *secundum aequum et bonum* as generally upon actions on the case, the judgments of the courts of law are guided by the most liberal equity. In matters of positive right both courts must submit to and follow these ancient and invariable maxims, *quae relicta sunt et tradita.* Both follow the law of nations, and collect it from history and the most approved authors of all countries, where the question is the object of that law, as in cases of the privileges of embassadors, hostages or ransom bills.

"In mercantile transactions, they follow the marine law and argue from the usages and authorities received in all maritime countries.

"Where they exercise a concurrent jurisdiction they both follow the law of the proper forum; in matters originally of ecclesiastical cognizance, they both equally adopt the canon or imperial law, according to the nature of the subject; and if a question

come before either, which was properly the object of a foreign municipal law, they would both receive information what is the rule of the country, and would both decide accordingly. Such then being the parity of law and reason which governs both species of courts, wherein (it may be asked) does their essential difference consist? It principally consists in the different modes of administering justice in each; in the mode of proof, the mode of trial and the mode of relief."[5]

In the states which have adopted the code system of civil remedies there is no difference between the mode of trial of a case which was of common law jurisdiction and the mode of trial of a case which is of equity jurisdiction, except that in a common law action a jury trial must be had, if demanded; in most of the states parties to an action and persons who are pecuniarily interested in the result of the action are in both cases of common law and of equity jurisdiction, equally competent to give their testimony for the purposes of the trial of the action.

Under the code system there is no ground for the exercise of what is called the equity jurisdiction of a court, except in cases in which a common law court could not by its judgment or order give to the injured party adequate relief.[6]

In suits of equity the issues of fact are tried and determined by the court, and in such suits should special issues of fact be submitted to a jury, the verdict of the jury is merely advisory to the court, and the court in its findings may adopt such verdict or disregard it.[7]

In the states which have adopted the code system of civil remedies, the same courts of record have jurisdiction of actions at law and of suits in equity.

The cases within the equity jurisdiction of such courts are the specific performance of executory agreements; the immediate prevention of waste or other irreparable injuries; the restraint of endless litigation; setting aside fraudulent deeds; decreeing reconveyances; directing absolute conveyances to stand as securities only; decreeing a sale of lands to discharge incumbrances, debts, etc.; the construction of real and personal securities as

5. 3 Bl. Com. 436.
6. Moulton v. Knapp, 85 Cal. 385; Herrlich v. Kaufmann, 99 Cal. 271.
7. Bell v. Marsh, 80 Cal. 411; Freeman v. Stephenson, 68 Cal. 499; Warring v. Frear, 64 Cal. 54.

mortgages, bonds, etc.; the execution of trusts; the guardianship of minors; the care and superintendence of charities;[8] and in all cases in which adequate relief cannot be given save by a court of equity.[9]

Under the code system of civil remedies there is but one form of civil action for the enforcément or protection of private rights and redress or prevention of private wrongs.[10]

In the common law courts there were fixed and prescribed forms for actions and fixed and prescribed forms for judgments in such actions. Questions of fact in such actions were determined by the verdict of a jury, and on the rendition of such verdict, if there were a general verdict, by which all the issues of fact were determined, judgment, if entered at all, must be entered on such verdict according to the form fixed and prescribed for such judgment. The court, if the verdict of the jury was allowed to stand, had no discretion as to the relief to be given by the judgment.

Courts of equity can no more disregard the law than can the common law courts; but for the reason that courts of common law jurisdiction can not render and enter judgments in such courts except according to fixed and prescribed forms, there are many cases in which, under the law, a party is entitled to relief which a court of common law jurisdiction cannot, by its judgment, give.

In such cases a court of equity being untrammeled by forms in respect to its judgment can give to such party the relief to which, under the law, he is entitled.

Under the code system of remedies the essential differences between a court of common law jurisdiction and a court of equity, is that in a court of common law jurisdiction issues of fact may at the option of the parties to the action be determined by the verdict of a jury, and in a court of equity jurisdiction such issues of fact must ultimately be determined by the decision of the court; and in a court of common law jurisdiction the judgment of the court must be in accordance with the prescribed forms; and hampered as such court is by these forms, such court

8. Lube Eq. Pl. 22.
9. Dougherty v. Creary, 30 Cal. 290, 297.
10. Code of Civil Procedure, Sec. 307.

can not give to a party the relief to which in many cases under the law he is entitled, while a court of equity unhampered by forms, can give to a party to a suit within the jurisdiction of that court, the exact relief to which under the law he is entitled; and as to the extent of such relief the court may in some cases use its discretion.

When the facts are found, a court of common law jurisdiction has no discretion in respect to the relief to be given by its judgment.

Both courts must obey the law, and neither court has any right to disobey the mandates of the law.

A court of equity has no jurisdiction of a case in which a court of common law jurisdiction can give adequate relief by its judgment or order except in a few cases where the courts have concurrent jurisdiction, but in all cases, except those over which some other tribunal has by law jurisdiction, and in respect to which there would be no remedy other than that which a court of equity could give, a court of equity as a general rule has jurisdiction.

Civil remedies are under the code system, divided into two classes: First, actions; second, special proceedings.

A civil action is an ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, or for the redress or prevention of a wrong, and every other civil remedy is a special proceeding.[11]

An action or civil proceeding is in personam, or in rem; that is, an action or proceeding against a person as a defendant, or against a thing as defendant; or it may be against a person as a defendant, and against a thing which belongs to such a person or to which such person makes a claim.

In an action against a person as a defendant, and which is not also an action against a thing which belongs to such person, or to which he makes some claim, the defendant must be served personally with the summons in the action or with proper notice of the action and of its object, and within the territorial limits of jurisdiction of the court in which the action was commenced or is pending; and if not so served, no personal judgment can be rendered against him in the action which would be enforceable

11. Code of Civil Procedure, Secs. 21, 23.

against his property, except so much thereof as had before judgment been brought under the control of the court by seizure or some equivalent act. But in an action or proceeding against a thing as defendant, or in an action against a person in which the court has acquired jurisdiction over property of such person, or over property to which such person makes some claim, such property will be bound by the judgment in the action, and a summons or notice in the action need not be personally served on, or given to the owner of the property, but if such summons be served on, or notice given to such owner, in the manner prescribed by the legislature, the judgment of the court rendered in the action or proceeding will be valid so far as the right of such person to such property is affected thereby, provided the notice given is a reasonable notice.

CHAPTER V.

OF THE COMMENCEMENT OF AN ACTION AND OF THE SERVICE OF THE SUMMONS THEREIN.

An action is commenced by filing a complaint in the action.

Within one year after the filing of such complaint a summons must be issued in the action, and such summons must be served, or a return thereon must be made within three years after the commencement of the action, otherwise the action will be dismissed on motion of any party interested in the action unless an appearance has been made by the defendant or defendants in the action within said period of three years.[1]

A defendant appears in an action when he answers, demurs or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him.[2]

The summons in an action is in California issued by the clerk of the court in which the action is commenced.

The summons must be served by the sheriff of the county in which the defendant served is found, or by any other person over the age of eighteen years who is not a party to the action; and the certificate of the sheriff of such service, when the summons is served by the sheriff, and when not served by a sheriff, the affidavit of the person serving the summons showing such service is evidence of such service.

When the summons is not served by the sheriff the person who served the summons must show by his affidavit that at the time of the service of the summons he was of the age of eighteen years or over, and that he was not a party to the action.

A copy of the complaint in the action must be served with the copy of the summons on each defendant in the action, and the evidence of service of the summons must show that such copy was so served.[3]

1. Code of Civil Procedure, Sec. 581, Sub. 7.
2. Code of Civil Procedure, Sec. 1014.
3. Code of Civil Procedure, Sec. 410.

The summons may be issued at any time within one year after the complaint is filed; and if the action be brought against two or more defendants who reside in different counties, a summons may be issued for each of such counties at the same time. At any time within a year after the complaint is filed, a defendant may, in writing, or by appearing and answering or demurring, waive the issuing of summons; and in an action against two or more defendants on a joint contract, and one of them has appeared in the action within one year after the complaint is filed, the other or others may be served, or appear after the year, at any time before trial.[4]

In case of the service of a summons the written admission by the defendant of such service when proven is evidence of such service.

The voluntary appearance of a defendant in an action is equivalent to the service of a summons and copy of the complaint on him.[5]

An alias summons in the same form as the original may be issued by the clerk within one year after the commencement of the action, but not thereafter, in case the original summons is returned without being served on any or all of the defendants, or is lost.[6]

A service of a summons in an action may, in the cases mentioned in section 412 of the Code of Civil Procedure, and on the order of the court or of the judge thereof, be made by publication, and the sending by mail, postage prepaid, a copy of the summons and a copy of the complaint addressed to the defendant at his last known place of residence. If such last place of residence be not known, then such sending by mail may be dispensed with.[7]

The affidavit to procure such order should state probative facts upon which the ultimate facts depend.[8]

When such order for the service of a summons by publication is made, a service of the summons on the defendant personally while absent from the state, may be made out of the state; but

4. Code of Civil Procedure, Sec. 406.
5. Code of Civil Procedure, Sec. 416.
6. Code of Civil Procedure, Sec. 408.
7. Code of Civil Procedure, Secs. 412, 413.
8. Ricketson v. Richardson, 26 Cal. 149.

without such order such service out of the state on such defendant is a nullity.[9]

In case of the service of a summons by publication, the evidence of the service is by the affidavit of the printer, his foreman or principal clerk, showing such publication, and an affidavit showing a deposit of a copy of the summons and a copy of the complaint in the postoffice, postage prepaid, addressed to the defendant at his last known place of residence when the order of the court requires that such deposit be made; and in case of an order for the service of the summons by publication, and the copy of the summons and of the complaint has been personally served on the defendant out of the state, an affidavit of such service showing the time and place thereof would be evidence of such service.[10]

When the entire object of an action is merely to obtain a personal judgment against the defendant, constructive service of the summons on the defendant by publication is ineffectual for such purpose.

But if the property of such defendant is brought under the control of the court by seizure or other equivalent act, as by a writ of attachment, or when the action is in the nature of a proceeding in rem, or is one affecting the personal status of a resident of the state in respect to a non-resident, as in an action for a divorce, a judgment therein would be binding, so far as it affects such property, interest or status, in the case of a constructive service of the summons in the manner provided by the laws of the state, although there was no personal service of the summons on the defendant in the action.[11]

In actions affecting the title to or right of possession of real property, a lis pendens may be recorded in the office of the county recorder of the county in which the land is situated, as provided by statute, and from the time of filing the same for record, a purchaser of, or encumbrancer on, the property affected by the action, has constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names in the notice of the pendency of the action.[12]

9. McBlain v. McBlain, 77 Cal. 507.
10. Code of Civil Procedure, Sec. 415.
11. Pennoyer v. Neff, 95 U. S. 714; Anderson v. Goff, 72 Cal. 66.
12. Code of Civil Procedure, Sec. 409.

Actions for the recovery of the possession of, quieting title to, or for the enforcement of liens on real estate, must be commenced in the county in which the real estate or some part thereof is situated.[13]

Other actions in a Superior Court may be commenced in any county in the state unless otherwise specially declared by statute.

13. California Constitution, Sec. 5, Art. VI.

CHAPTER VI.

OF PARTIES TO AN ACTION.

An infant, insane or incompetent person must appear in an action by his general guardian, or by a guardian *ad litem* appointed by the court.

Such guardian *ad litem* may be appointed by the court or by a judge thereof, notwithstanding such infant, insane or incompetent person has a general guardian.[1]

The appointment of a guardian *ad litem* in an action must be as prescribed by the provisions of section 373 of the Code of Civil Procedure.

Every action must be prosecuted in the name of the real party in interest, with the exception that an executor or administrator or trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the persons for whose benefit the action is prosecuted.[2]

Actions for the recovery of any property, real or personal, and all actions, founded upon contract, may be maintained by and against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates.[3]

Executors and administrators may maintain actions against any person who has wasted, destroyed, taken or carried away, or converted to his own use, the goods of their testator or intestate in his lifetime.[4]

Any person or his personal representatives may maintain an action against the executor or administrator of a testator or intestate, who in his lifetime has wasted, destroyed, taken or carried away or converted to his own use, the goods or chattels of such

1. Code of Civil Procedure. Sec. 372.
2. Code of Civil Procedure, Secs. 367, 369.
3. Code of Civil Procedure, Sec. 1582.
4. Code of Civil Procedure, Sec. 1583.

person, or committed any trespass on the real estate of such person.[5]

The devisees or heirs of a testator or intestate may themselves, or jointly with the executor or administrator, maintain an action for the possession of real estate owned by the decedent at the time of his death, or for the purpose of quieting title to the same against any one except the executor or administrator.[6]

That section, however, does not require them so to do. Prior to the passage of that section of the code the heir or devisee of a decedent could not maintain, during the pendency of the administration of the estate of such decedent, an action for the possession of the real estate of such decedent unless the possession of such real estate was by the order of the court directed to be delivered to him; such action for the possession of such real estate could only be maintained by the executor or administrator of the decedent, and they could have maintained such action even against a devisee or heir of such decedent.[7]

When a married woman is a party to an action, her husband must be joined with her except:

1. When the action concerns her separate property, or her right or claim to the homestead property, she may sue alone;

2. When the action is between herself and her husband she may sue or be sued alone;

3. When she is living separate and apart from her husband by reason of his desertion of her, or by agreement in writing entered into between them, she may sue or be sued alone.[8]

If a husband and wife be sued together, the wife may defend for her own right, and if the husband neglect to defend, she may defend for his right also.[9]

An unmarried female may prosecute, as plaintiff, an action for her own seduction, and may recover therein such damages pecuniary or exemplary as are assessed in her favor.[10]

At common law a woman could not maintain an action for her own seduction.[11]

5. Code of Civil Procedure, Sec. 1584.
6. Code of Civil Procedure, Sec. 1452.
7. Meeks v. Kahn, 20 Cal. 627; Chapman v. Hollister, 42 Cal. 463; Page v. Tucker, 54 Cal. 121.
8. Code of Civil Procedure, Sec. 370.
9. Code of Civil Procedure, Sec. 371.
10. Code of Civil Procedure, Sec. 374.
11. Weaver v. Bachert, 44 Am. Dec. 159.

A father, or in case of his death or desertion of his family, the mother may prosecute as plaintiff an action for the seduction of the daughter, and the guardian for the seduction of the ward, though the daughter or ward be not living with or in the service of the plaintiff at the time of the seduction or afterwards, and there be no loss of service.[12]

At common law the gist of the action for the seduction of a daughter or of a female ward was the loss of service of the daughter or female ward by reason of the seduction.[13]

Section 375 of our Code of Civil Procedure settles in California all controversy as to the right of the mother to maintain an action for the seduction of her daughter in case of the death of the father or of his desertion of his family, and settles in California all controversy as to the right of a guardian to maintain an action for the seduction of his ward, and the loss of the service of the seduced female is no longer, in California, necessary for the purpose of maintaining such action.

A father, or in case of his death or desertion of his family, the mother may maintain an action for an injury to, or for the death of a minor child; and a guardian may maintain an action for an injury to or for the death of his ward, when such injury or death is caused by the wrongful act or neglect of another. Such action may be maintained against the person causing the injury or death, or if such person be employed by another person who is responsible for his conduct, also against such other person.[14]

When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just.[15]

12. Code of Civil Procedure, Sec. 375.
13. Notes to Coon v. Moffett, 4 Am. Dec. 392.
14. Code of Civil Procedure, Sec. 376.
15. Code of Civil Procedure, Sec. 377.

A civil action for damages for the death of a person *per se* could not be maintained by any one at common law.[16]

Such actions can only be maintained under and by virtue of our statute law.

The father of a minor child who has received personal injuries, not causing death, by the wrongful acts, or from the negligence of another person in an action against that person, can recover such damages only as the father has himself sustained from the consequent loss of the services of the child during its minority and by reason of the expenses which the father has incurred in consequence of the injury, such as for surgical attendance, nursing and the like, leaving to the infant a further right of recovery of such damages as are personal to himself.[17] The expenses so incurred need not have been actually paid.[18]

Only one action is permitted under the provisions of section 377 of the Code of Civil Procedure, namely: an action by the heirs of the person killed, or an action by an executor of his will or the administrator of his estate.

In such action the sorrow, grief and mental suffering of the relative of the person killed caused by his death are not circumstances to be considered in estimating the amount of damages to be recovered in the action, though the jury may take into consideration the loss of comfort, society and protection of the deceased.[19]

It was held by the Supreme Court in Beeson v. G. M. G. M. Co., 57 Cal. 20, that in one sense the value of social relations between the plaintiff, who was the widow of the deceased, and the deceased, and the value to her of his society, cannot be measured by any pecuniary standard, but in another sense it might not only be possible, but eminently fitting, that a loss from the severing of said relations or from the deprivation of society, might be measured, or at least considered from a pecuniary standpoint.

In Munro v. Dredging Co., 84 Cal. 515, the Supreme Court held that the damage to a mother from the death of an adult son

16. Kramer v. S. F. R. R. Co., 25 Cal. 434.
17. Durkee v. C. C. R. R. Co., 56 Cal. 388.
18. Donnelly v. Hufschmidt, 79 Cal. 74.
19. Munro v. Dredging Co., 84 Cal. 515.

who was killed by reason of the negligence of the defendant, should have been confined to the pecuniary loss.

All persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs, except when otherwise provided in the title of the Code of Civil Procedure respecting parties to civil actions.[20]

When the question involved in the action is one of common or general interest of many persons, or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for the benefit of all.[21]

A person can be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein. And in an action to determine the title or right of possession to real property, and which possession at the time of the commencement of the action is in a tenant, the landlord may be joined as a party defendant.[22]

Before the enactment of this section of the code it was held by the Supreme Court that in case real estate sued for was in the possession of a tenant, the landlord was not a proper defendant in the action.[23]

In an action brought by a person out of possession of real property, to determine an adverse claim to an interest or estate therein, the person making such adverse claim, and persons in possession may be joined as defendants; and if the judgment be for the plaintiff, he may have a writ for the possession of the premises as against the defendant in possession against whom the judgment has passed.[24]

This section permits the joining an action in equity to quiet title to real estate, and an action at law for the possession of such real estate. In the action at law either of the parties has the right to a trial by jury; in the action in equity neither of the parties is entitled to a trial by jury as a matter of right.

It was held in Weber v. Marshall, 19 Cal. 477, in which there was an equitable defense alleged in an action at law for the

20. Code of Civil Procedure, Sec. 378.
21. Code of Civil Procedure, Sec. 382.
22. Code of Civil Procedure, Sec. 379.
23. Dimick v. Deringer, 32 Cal. 491.
24. Code of Civil Procedure, Sec. 380.

possession of real estate, that the court must pass on that defense before the trial of the action at law and under the rule in that case, when an action at law and an action in equity are joined, the action in equity should be first tried.

Any two or more persons claiming any estate or interest in lands under a common source of title, whether holding as tenants in common, joint tenants, coparceners, or in severalty, may unite in an action against any person claiming an adverse estate or interest therein, for the purpose of determining such adverse claim, or of establishing such common source of title, or of declaring the same to be held in trust, or of removing a cloud from the same.[25]

Of the parties to the action, those who are united in interest must be joined as plaintffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason therefor being stated in the complaint.[26]

Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, may all or any of them, be included in the same action at the option of the plaintiff.[27]

It was held in Powell v. Powell, 48 Cal. 235, that in a case in which an executor had given two bonds, one with two sureties when letters testamentary were issued to him, and one with other and different sureties, when an order was made for the sale of real estate, an action could be maintained against the principal and all the sureties on these two bonds, and that in so doing there was no misjoiner of causes of action or of the defendants in the action.

It has been held in New York and some other states that the principal debtor and his guarantor could not be sued in the same action. Carman v. Floss, 23 N. Y. 286.

An action or proceeding does not abate by the death or any disability of a party, or by a transfer of any interest therein, if the cause of action survive or continue.[28]

25. Code of Civil Procedure, Sec. 381.
26. Code of Civil Procedure, Sec. 382.
27. Code of Civil Procedure, Sec. 383.
28. Code of Civil Procedure, Sec. 385.

The cause of action for damages from a personal tort dies with the wrongdoer, except when otherwise provided by statute law, and it is not assignable.[29]

In the case of the death or any disability of a party, the court, on motion, may allow the action or proceeding to be continued by or against his representatives or successor in interest. In case of any other transfer of interest the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding.[30]

In case of the death of a party after a money judgment against him and no execution was issued to enforce the judgment before his death, no execution can be issued to enforce such judgment after his death;[31] and in such case an attachment levied on the property of the person in his lifetime is dissolved by the death.[32] But if an execution be issued and levied on the property of the person before his death, the property so levied on may be sold under the execution after his death.[33]

If a person die after verdict or decision upon any issue of fact and before judgment, the court may render judgment thereon; such judgment will not be a lien on the real estate of the deceased party, but is payable in the due course of the administration of his estate.[34]

In case of the death of a party to an action during the pendency of the action, the practice in California is, on the suggestion of the death of such person, by a party to the action and on proof of such death, and the appointment and qualification of the executor or administrator of his estate, for the court in which the action is pending, by order, to substitute such executor or administrator as a party to the action in place of such deceased person, and all subsequent proceedings should be in the name of the substituted party and no amendment of the previous pleading or proceeding in the action is necessary by reason of such substitution.[35]

29. Lawrence v. Martin, 22 Cal. 174.
30. Code of Civil Procedure, Sec. 385.
31. Code of Civil Procedure, Sec. 1505.
32. Ham v. Cunningham, 50 Cal. 365.
33. Code of Civil Procedure, Sec. 1505.
34. Code of Civil Procedure, Sec. 669.
35. Kittle v. Bellegarde, 86 Cal. 556; Campbell v. West, 93 Cal. 653.

The death of a party pending an appeal does not render the judgment of the appellate court void, although there was no substitution of his representatives.[36]

If a party to an action dies pending an appeal, the order substituting his personal representative should be made in the Supreme Court.[37]

A personal judgment cannot be rendered against the representatives of a person who was a party to the action but died during its pendency, and such representatives were substituted in his place. The judgment should be payable in the due course of the administration of the estate of the deceased person.[38]

If after the death of a party defendant in an action, on the motion of plaintiff, his executor is substituted as defendant in his place and no notice of this fact is served on the executor, and such executor does not appear in the action and does not adopt the answer of his testator, a judgment in the action against such deceased person is a nullity so far as the executor is concerned.[39]

If during a pendency of an action respecting real estate, such real estate be transferred, the grantee of the property may continue the prosecution or defense of the action in the name of the grantor, or procure an order for the substitution of himself as a party to the action in place of such grantor.[40]

When an action has been commenced for the possession of property and the plaintiff's title to the property has been transferred to another person during the pendency of the action, if the defendant wishes to take advantage of the transfer for any purpose, he must do so by a supplemental answer; the transferee on his part, has the right to prosecute the action in the name of the original plaintiff.[41]

Under the code system of civil remedies in California, every action must be prosecuted in the name of the real party in interest except as provided in section 369 of the Code of Civil Procedure.[42]

36. Phelan v. Tyler, 64 Cal. 80.
37. Lyons v. Roach, 72 Cal. 85.
38. Estate of Schroder, 46 Cal. 304.
39. McCreery v. Everding, 44 Cal. 286; Judson v. Love, 35 Cal. 46.
40. Malone v. Big Flat G. M. Co., 93 Cal. 384.
41. Hestress v. Brennan, 37 Cal. 385.
42. Code of Civil Procedure, 367.

This is the equity rule in respect to parties to actions.

It was a general rule at common law, to which, however, there were some exceptions, that in actions ex contractu, the action must be brought in the name of the person in whom the legal interest in the contract is vested, and in action for torts, the action must be brought in the name of the person whose legal right has been affected and who was legally interested in the property at the time the injury thereto was committed.[43]

The general rule as to parties in suits in equity was, that all persons concerned in the demand or who may be affected by the relief prayed for, ought to be parties, if within the jurisdiction of the court.[44]

All causes of actions, except those for personal torts, such as assault, libel and the like, which die with the person, are, under the code system, assignable, and the assignee of such assignable causes of action can sue thereon in his own name, subject to any set off or other defense existing at the time of notice of such assignment.

A negotiable promissory note or bill of exchange, however, transferred in good faith and upon good consideration therefor, before maturity, is not, in a suit thereon by such transferee, subject to such set off or other defense.

If the transfer of a negotiable promissory note or bill of exchange be made after maturity, then the transferee takes subject to such set off or other defense.

When cross demands have existed between persons under such circumstances that if one had brought an action against the other, a counter claim could have been set up, the two demands shall be deemed compensated, so far as they equal each other, and neither can be deprived of the benefit thereof, by the assignment or death of the other.[45]

This section was probably intended to meet the case of a counter claim alleged in the answer of a defendant and to which there was a cross demand and there was no opportunity to plead it.[46]

43. 1 Chitty Pl. 268.
44. Lube Eq. 36.
45. Code of Civil Procedure, Sec. 440.
46. Hart v. Cooper, 47 Cal. 77.

Many of the provisons under the code system respecting parties to actions, were intended to prevent delays in the administration of justice, and to prevent the sometimes denial of justice by rules in common law actions respecting the parties to actions.

Under the code system, the court should be liberal in permitting amendments to pleadings by adding or striking out the name of any party if in furtherance of justice.[47]

There are cases in which persons may be proper parties to an action, but who are not necessary parties thereto.

When a mortgagor of real estate dies after making the mortgage and there is an administrator of his estate such administrator is the only necessary party defendant in an action to foreclose such mortgage.[48]

The heirs of the decedent, however, would have been proper parties to such an action.

If there were a homestead on mortgaged property selected and recorded prior to the death of a decedent, the surviving wife of such decedent would be a necessary party defendant in the foreclosure action, and it would have been necessary to have presented for allowance and approval, the mortgage and debt as a claim against the estate of the decedent.[49]

A person against whom an action is pending upon a contract, or for specific personal property, before answer, upon such affidavit, as is prescribed in section 386 of the Code of Civil Procedure, may, when a person not a party to the action, makes against him and without any collusion with him, a demand upon such contract or for such property, on notice to such person and to the adverse party, apply to the court, for an order to substitute such person in his place, and to discharge him from liability to either party, on his depositing in court the amount claimed on the contract, or delivering the property or its value to such person as the court may direct, and the court may, in its discretion, make the order. And whenever conflicting claims are or may be made on a person, for or relating to personal property or the performance of an obligation, or any portion thereof, such person may bring an action against the conflicting claimants to compel them to in-

47. Code of Civil Procedure, Sec. 473.
48. Bayly v. Muehe, 65 Cal. 345; Collins v. Scott, 100 Cal. 452.
49. Code of Civil Procedure, Sec. 1475; Camp v. Grider, 62 Cal. 20.

terplead, and litigate their several claims among themselves, and the order of substitution may be made, and the action of interpleader may be maintained, and the application of the plaintiff to be discharged from liability to all or any of the conflicting claimants may be granted, although the title or claims of the conflicting claimants have not a common origin or are not identical, but are adverse to and independent of one another.[50]

Before that amendment it had been held by the Supreme Court in Pfister v. Wade, 56 Cal. 46, that an action to compel conflicting claimants to interplead could not be maintained, when the claims of the conflicting claimants were not identical in amount or did not relate to the same debt or duty, or if they arose out of separate and independent contracts.

Any person who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both may, by permission of the court before trial, intervene in an action or proceeding.[51]

Such intervention is made by a complaint setting forth the ground on which the intervention rests, a copy of which is to be served on the parties who have not appeared in the action, and upon the attorneys of the parties who have appeared, and who may answer or demur to it as if it were an original complaint.[52]

The right to intervene under the provision of that section before trial, is not limited to any particular kind or class of actions.[53]

An intervention cannot be allowed after final judgment,[54] and it ought not to be allowed when the action has been long pending, and the application to intervene is made just as the plaintiff is taking judgment.[55]

When two or more persons are associated in business and transact such business under a common name, the associates can be sued by such common name, and the summons in the action may be served on one or more of such associates and the judg-

50. Code of Civil Procedure, Sec. 386 as amended in 1881.
51. Code of Civil Procedure, Sec. 387.
52. Code of Civil Procedure, Sec. 387.
53. Robinson v. Crescent City, etc., Co. 93 Cal. 316.
54. Owens v. Colgan, 97 Cal. 454.
55. Hocker v. Kelly, 14 Cal. 164.

ment in the action will bind the joint property of all such associates.[56]

This section does not authorize an action to be brought by such associates in such common name.[57]

It was held in King v. Randlett, 33 Cal. 321, that a statute authorizing an action against associates transacting business under a common name, by such common name, as defendant, was in derogation of the common law, and that it must be strictly construed.

That case was decided in 1867, and the rule now is, that the former rule, that statutes in derogation of the common law are to be strictly construed, has no application to the Code of Civil Procedure.[58]

The court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights, but when a complete determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in.[59]

One tenant in common is entitled to an injunction against a wrongdoer to prevent an interference with the right of such tenant in common to flowing water, and the court is not required to bring in his co-tenants as parties to the action.[60]

56. Code of Civil Procedure, Sec. 388.
57. Gilman & Co. v. Cosgrove, 22 Cal. 356.
58. Code of Civil Procedure, Sec. 4.
59. Code of Civil Procedure, Sec. 389.
60. Lytle Creek Water Co. v. Perdew, 65 Cal. 447.

CHAPTER VII.

OF THE PLACE OF THE COMMENCEMENT AND OF THE TRIAL OF ACTIONS.

An action for the recovery of the possession of quieting the title to, or for the enforcement of liens on real estate must be commenced in the county in which such real estate, or some part thereof, is situated, otherwise the judgment rendered in the action unless it be one of dismissal of the action, will be void.[1]

All other actions, the subject matter of which is within the jurisdiction of a Superior Court, except perhaps the actions mentioned in section 394 of the Code of Civil Procedure relating to actions against a city or county, and an action for a penalty brought under section 393 of that code, may be commenced in any Superior Court of the state, subject to the right of either party to the action, when entitled to such transfer, to have the action transferred to another county for trial.

Actions against a municipal corporation for damages for injuries to real or personal property within its corporate limits, done or caused by mobs or riots, must be tried in the county in which the property injured is situated; and must be commenced within one year after the act complained of is committed.[2] The provisions of the Code of Civil Procedure, which were the law when the constitution of California of 1879 was adopted, were, that actions for the following causes must be tried in the county in which the subject of the action, or some part thereof is situated, subject to the power of the court to change the place of trial, namely: actions for the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property and for parti-

1. California Constitution, Art. VI. Sec. 5, Urton v. Woolsey, 87 Cal. 38; Fritts v. Camp, 94 Cal. 398.
2. Political Code, Secs. 4453, 4454.

tion of real property, and for the foreclosure of liens and mortgages on real property; if, however, in an action for the foreclosure of liens and mortgages on real property, the plaintiff in the action in his complaint pray for an injunction, or applies pending the action for an injunction, the proper county for the trial of such action is the county in which the defendant resided or a majority of the defendants resided, at the commencement of the action.

Subject to the power to change the place of trial, actions against a public officer, or person especially appointed to execute his duties, for an act done by him in virtue of his office, or against a person who by his command or in his aid does anything touching the duties of such officer, and actions for the recovery of a penalty or forfeiture imposed by statute, must be tried in the county where the cause of action or some part thereof arose; except that when a penalty or forfeiture is imposed by the statute for an offense which is committed on a lake, river, or other stream of water, situated in two or more counties, an action for the recovery of such penalty or forfeiture may be brought in any county bordering on such lake, river or stream, and opposite to the place where the offense was committed[3].

An action against a county, or city and county may be commenced and tried in such county, or city and county, unless such action is brought by a county or city and county, in which case, it may be commenced and tried in any county, or city and county not a party thereto. If an action be brought by a county or city against a citizen of another county, or a corporation doing business in such other county, such action must, on the motion of the defendant therein, be transferred for trial to a county other than plaintiff, if the plaintiff be a county, and other than the county in which the plaintiff is situated, if the plaintiff be a city.[4]

A corporation or association, may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or breach occurs, or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial

3. Code of Civil Procedure, Sec. 393.
4. Code of Civil Procedure, Sec. 394.

as in other cases.[5] The word *may* used in this section of the constitution is permissive and not mandatory.[6]

In all cases other than those herein before mentioned, the action must be tried in the county in which the defendants or some of them resided at the commencement of the action.[7]

If, however, none of the defendants reside in this state, or if residing in the state, the county in which they reside is unknown to the plaintiff, the action may be tried in any county which the plaintiff may designate in his complaint, and if the defendant is about to depart from the state, the action may be tried in any county where either of the parties reside, or service is had, subject to the power of the court to change the place of trial, as in other cases provided in the Code of Civil Procedure.[8]

These provisions of the Code of Civil Procedure do not do away with, nor affect the provisions of the constitution in respect to the county in which actions affecting real estate must be commenced.

When the county in which the action is commenced is not the proper county for the *trial* of the same, the action may be tried therein, unless the defendant at the time he appears and answers or demurs, files an affidavit of merits, and demands in writing that the trial be had in the proper county.[9]

Defendants who are residents of a county other than the county in which the action is commenced, if they wish to have the action transferred for trial to the proper county for its trial, must, at the time they appear and answer, or demur to the complaint in the action, file in the action, an affidavit or affidavits showing the county which was the proper county for the trial of the action at the time of the commencement of the action, an affidavit of merits, and a written demand that the trial be had in the proper county.[10]

Notice of a motion to change a place of trial is not such a demand.[11]

5. Const. Art. XII, Sec. 16.
6. National Bank v. Superior Court, 83 Cal. 492.
7. Code of Civil Procedure, Sec. 395.
8. Code of Civil Procedure, Sec. 395.
9. Code of Civil Procedure, Sec. 396.
10. Nicholl v. Nicholl, 66 Cal. 36.
11. Estrada v. Orena, 54 Cal. 407.

Within the intent and meaning of section 537 of the Code of Civil Procedure, the residence of a private corporation is the county in which it has its principal place of business, and the residence of a municipal corporation is where its territory is, and where all of its constituents reside.[12]

The place of a trial of an action for damages, commenced in a county in which none of the defendants resided at the commencement of the action will be changed to the proper county on an application made as provided in section 396 of the Code of Civil Procedure by the defendants who have been served with process, and the disqualification of the judge of the proper county in no way affects the right of the defendants to a change of the place of trial.[13]

An involuntary substituted defendant, when he appears and demurs or answers in the action, is entitled to the rights as to the place of trial of the action, given by section 396 of the Code of Civil Procedure, although the original defendant in the action had not sought to avail himself of such rights.[14]

The right of a defendant to have the place of trial of an action changed to the county of his residence is not affected by the joinder of another defendant who is not a necessary party to the action and against whom no cause of action is stated.[15]

When a defendant has made a motion to change the place of trial of an action to the county of his residence under the provisions of section 396 of the Code of Civil Procedure, it is the duty of the court to act upon that motion and either to grant or deny it, before taking any other judicial action in the case.[16]

When a complaint in an action states two causes of action, as to one of which the defendant has a right to a change of venue, but not as to the other, the case should be transferred.[17]

The right to a change of venue is to be determined by the condition of things existing at the time the person claim-

12. Buck v. City of Eureka, 97 Cal. 135.
13. Rathgeb v. Tiscornia, 66 Cal. 96.
14. Howell v. Thompson, 69 Cal. 153.
15. Sayward v. Houghton, 82 Cal. 630.
16. Brady v. The Times-Mirror Co., 106 Cal. 60, 61.
17. Ah. Fong v. Stevens, 79 Cal. 33.

ing it first appeared in the action.[18] The affidavit of residence, however, must show that the residence of the defendant was at the time of the commencement of the action in the county to which he demands to have it transferred.

Great care must be taken in framing the affidavit of merits to be filed for a change of venue.

The affidavit of merits should show that the defendant has fully and fairly stated the case, or the facts of the case, to his counsel (naming him), who upon such statement advised him that he had a good and substantial defense upon the merits of the action; which he verily believes to be true.[19]

The words which he verily believes to be true, may, however, be omitted from the affidavit of merits.[20]

In that case the affidavit of merits filed for the motion for a change of venue is set out in full in the opinion of the court.

The affidavit of merits may be made by one of several defendants on behalf of all the defendants at their request if so stated in the affidavit, and if it be further stated therein, that the affiant has, and the other defendants have fully and fairly stated the facts of the case to their attorneys therein;[21] and it may be made by the principal defendant, or several defendants in the action, when he states in the affidavit in connection with other material statements that he has personal knowledge of the matters to be put in issue in the action.[22]

An affidavit of merits made by the attorney of a defendant is sufficient, if such affidavit shows a sufficient reason why it was not made by the defendant.[23]

All of the defendants who have been served and who are necessary parties to the action should join in the demand and motion for the change of the place of trial, unless good reason is shown why they have not so joined.[24]

18. Id.
19. Buell v. Dodge, 63 Cal. 554; McSherry v. Penn. C. G. M. Co., 97 Cal. 637.
20. Watt v. Bradley, 95 Cal. 415.
21. McSherry v. Penn. C. G. M. Co., 97 Cal. 642.
22. Rowland v. Coyne, 55 Cal. 4.
23. Nicholl v. Nicholl, 66 Cal. 37.
24. Remington S. M. Co. v. Cole, 62 Cal. 311; Pieper v. C. Land Co., 56 Cal. 175; McKenzie v. Barling, 101 Cal. 459.

The court in its discretion may grant to the defendant leave to amend the affidavit of merits.[25]

An affidavit of merits in which the words are used that the defendant has fully and fairly stated to his counsel his case, or his defense, or the facts constituting the defense of the defendants, instead of the words, the case, or the facts of the case, is insufficient.[26] When one of the defendants who is a necessary party to the action resides in the county in which the action is brought, such county is the proper county for the trial of the action.[27] The court in which the action is pending may change the place of trial to another county, when it appears from affidavits or otherwise that there is reason to believe that an impartial trial cannot be had in the county in which the action is pending; and the court can in like manner change the place of trial of the action when it appears that the convenience of witnesses and the ends of justice will be promoted by the change.[28]

The motion for such change is addressed to the sound discretion of the court; and its action thereon will not be reversed, on appeal, unless it appears that this discretion has been abused, or that injustice has been done.[29]

Facts must be shown by affidavits, or otherwise, so that the court will be able therefrom to draw its own inference, as to whether a change of trial should be granted.[30]

If the demand for a change of the place of trial to the county of the residence of the defendant be accompanied by the answer of the defendant, it may be resisted by a counter motion to retain the action in the county in which it is pending, on the ground of convenience of witnesses; but if such demand be accompanied by a demurrer, the demand cannot be resisted by a motion to retain the action, but the motion to transfer the action for the convenience of witnesses must be made in the court to which the action is transferred, after the answer of the defendant has been filed in the action.[31]

25. Palmer & Rey v. Barclay, 92 Cal. 201.
26. People ex rel. v. Larue, 66 Cal. 235; Palmer & Rey v. Barclay, 92 Cal. 201; Nickerson v. California R. Co., 61 Cal. 268.
27. McKenzie v. Barling, 101 Cal. 459.
28. Code of Civil Procedure, Sec. 397.
29. Avila v. Meherin, 68 Cal. 478.
30. Sloan v. Smith, 3 Cal. 413.
31. Thomas v. Placerville G. Q. M. Co., 65 Cal. 601.

In case the judge of the court in which the action is to be tried is disqualified the action must be transferred to another court for trial;[32] but if, when the motion to transfer the action for such cause comes on to be heard, the judge of another Superior Court is holding a session of the Superior Court for such disqualified judge, and at his request, and such judge of another court is qualified to try the case, and is ready and willing to do so, such motion for the change of the place of trial should be denied.[33]

Before the passage of the act of the legislature of 1897, amending section 170 of the Code of Civil Procedure in respect to the disqualification of judicial officers, a judge was not disqualified by reason of bias or prejudice from sitting and acting as judge on the trial of a case.[34]

By that act of 1897 (statutes 1897, page 287), a judge is disqualified by reason of such bias or prejudice and such bias or prejudice can be shown by affidavits.

32. Livermore v. Brundage, 64 Cal., 299; Krumdick v. Crump, 98 Cal. 119.
33. Upton v. Upton, 94 Cal. 26; Paige v. Carroll, 61 Cal. 216.
34. Mining Co. v. Mining Co., 83 Cal. 617.

CHAPTER VIII.

OF PLEADINGS IN AN ACTION AND OF THE COMPLAINT THEREIN.

Pleadings are defined by Blackstone to be the mutual altercations between the plaintiff and the defendant; which formerly at common law were usually put in by their counsel ore tenus and then minuted down by the chief clerk or prothonotary.[1] At common law the first pleading on the part of the plaintiff was the declaration.

At common law a nonsuit of the plaintiff in an action was from the default and neglect of the plaintiff, and therefore he was allowed to begin his suit again upon the payment of costs; but a retraxit was an open and voluntary renunciation by the plaintiff of his suit in court, and by this he forever lost his action.[2]

The first pleadings on the part of the defendant at common law, was a demurrer to the declaration which raised an issue of law, and a plea to the jurisdiction of the court, a plea to the disability of the plaintiff, a plea in abatement, and a plea in bar, or to the merits of the action; these pleas, with the exception of the plea in bar were dilatory pleas.[3] The plaintiff could demur to the plea in bar or file a replication thereto.

To this replication, the defendant could file a rejoinder; to this rejoinder, the plaintiff could file a sur-rejoinder, and so on until there were certain and material issues of fact raised by the pleadings.

Under the code system, the pleadings are defined to be the formal allegations by the parties, of their respective claims for the judgment of the court, and the pleadings allowed on the part of the plaintiff are:

1. 3 Bl. Com. 294.
2. 3 Bl. Com. 295, 296.
3. 3 Bl. Com. 310, 311.

1. The complaint.
2. The demurrer to the answer.
3. Demurrer and answer to a cross complaint.

And on the part of the defendant:

1. The demurrer to the complaint.
2. The answer.
3. The demurrer to answer to the cross complaint.[4]

The complaint must contain:

1. The title of the action, the name of the court and county in which the action is brought, and the names of the parties to the action.

2. A statement of facts constituting the cause of action, in ordinary and concise language.

3. A demand of the relief which the plaintiff claims. If the recovery of money or damages be demanded, the amount thereof must be stated.

The plaintiff may unite several causes of action in the same complaint where they all arise out of—

1. Contracts express or implied;

2. Claims to recover specific real property, with or without damages for the withholding thereof, or for waste committed thereon, and the rents and profits of the same;

3. Claims against a trustee by virtue of a contract, or by operation of law.

4. Claims to recover specific personal property, with or without damages for the withholding thereof.

5. Injuries to character.

6. Injuries to person.

7. Injuries to property.

The causes of action so united must all belong to one only of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated; but an action for malicious arrest and prosecution, or either of them, may be united with an action for either an injury to character or to the person.[5]

Each cause of action stated in a complaint, when more than one cause of action is stated therein, should be complete in

4. Code of Civil Procedure, Secs. 420, 427, 442.
5. Code of Civil Procedure, Sec. 427.

itself, without reference to another cause of action stated in the same complaint.[6] This rule was not approved by Justice McFarland in a dissenting opinion in that case.

The complaint should show a cause of action existing at the commencement of the action.[7] An allegation that the plaintiff was the owner of property at some time previous to the commencement of the action is not an allegation of the ultimate fact that he was such owner at the time of the commencement of the action.[8]

A printed signature of the attorney of the plaintiff to a complaint is a sufficient signature thereto.[9]

Every pleading in a court of record must be subscribed by the party or his attorney.[10]

In courts of justice of the peace, pleadings need not be so subscribed. Montgomery v. Superior Court, 68 Cal. 410.

Whatever is an essential element to a cause of action must be presented by a direct averment and cannot be left to an inference to be drawn from the construction of a document attached to the complaint.[11] Recitals in an instrument set out in full in a pleading are not an averment of the facts which in such instruments are recited.[12] There is no difference between setting forth such instrument in the body of the pleading and in annexing it as an exhibit, and making it a part of the pleading by a proper reference. In each case the copy is a part of the pleading.[13] Ultimate facts only should be averred in pleadings.[14]

Under the code system of pleading the common law forms of actions are cast aside, and every action is under that system a special action on the case.[15]

In pleadings, statements of mere conclusions of law are

6. Pennie v. Milreth, 81 Cal. 127.
7. Affierbach v. McGovern, 79 Cal. 269.
8. Fredericks v. Tracy, 98 Cal. 660.
9. Hancock v. Bowman, 49 Cal. 413.
10. Code of Civil Procedure, Sec. 446.
11. Burkett v. Griffith, 90 Cal. 532.
12. Lambert v. Haskell, 80 Cal. 613.
13. Lambert v. Haskell, 80 Cal. 613.
14. Miles v. McDermott, 81 Cal. 273.
15. Jones v. Steamship Curtis, 17 Cal. 499; Rogers v. Duhart, 97 Cal. 504.

insufficient; the facts from which the conclusions of law are drawn must be stated.[16]

The allegation that one is the "owner" of property is an allegation of an ultimate fact, unless the context shows that it was intended as a mere conclusion from other facts stated.[17]

The following allegations have been held to be allegations of conclusions of law, namely: allegations of "indebtedness" or that a certain sum is due.[18] That acts were "wrongful" or "unlawful."[19] That an act was "wrongfully" or "unlawfully" done;[20] or was "fraudulent."[21] The word "duly" is a statement of a conclusion of law and should not be used in a pleading except when such use is allowed by statute.

Facts should be alleged showing that an act was unlawful, or wrongful, or fraudulent, or showing indebtedness or that a certain sum is due.

Statements of conclusions of law in a pleading are useless.[22]

Our Supreme Court has held, however, that the ordinary counts in indebitatus assumpsit in common law actions, state facts sufficient to constitute a cause of action under the code system of pleading.[23]

No satisfactory definition has ever been given of an ultimate fact, such as is required to be stated under the Code system of pleading, and it is a safe rule that pleadings should observe the form of expression as contained in precedents approved by the decisions of the highest courts of the state.

It is stated by Stephens in his work on pleadings "it may be observed, that though it is in general unnecessary to allege matters of law, yet there is sometimes occasion to make mention of them for the convenience or intelligibility of the statement of fact;"[24] and there can be no objection to such statement of law in a pleading when made for such a purpose.

16. Wilkins v. Stidger, 22 Cal. 231; Ohm v. San Francisco, 92 Cal. 437.
17. Turner v. White, 73 Cal. 301.
18. Doyle v. Insurance Co., 44 Cal. 264; Frish v. Caler, 21 Cal. 71.
19. Payne and Dewey v. Treadwell, 16 Cal. 244.
20. Going v. Dinwiddie, 86 Cal. 639.
21. Triscony v. Orr, 49 Cal. 617.
22. Ohm v. San Francisco, 92 Cal. 437.
23. Abadie v. Carrillo, 32 Cal. 175.
24. Stephens on Pleadings, 347.

The facts, however, should be stated from which such conclusions of law arise.

The Code rule as to a statement of fact, is that such statement constituting the cause of action must be in ordinary and concise language.

A plaintiff must allege in his complaint that he has sustained damages in order to recover a judgment for damages.[25]

Damages which are the natural and necessary consequence of the wrong complained of, may be alleged in a general way; but when the law does not necessarily imply that the plaintiff sustained damage by the act complained of, the resulting damage should be shown with particularity.[26]

The plaintiff should state in his complaint a demand for the relief which he claims; and if the recovery of money or damages be demanded the amount thereof must be stated.[27]

In an action to recover the possession of personal property, the plaintiff in his prayer for relief, may demand judgment for the possession of the property, or the value thereof, in case a delivery cannot be had, and damages for the detention. If the property has been delivered to the plaintiff in proceedings under the provisional remedy of claim and delivery, the defendant in his answer may demand judgment for a return of the property, or the value thereof in case a return cannot be had, and damages for taking and withholding the property.[28]

In actions in equity the plaintiff should demand the specific relief to which he claims he is entitled, and, as a general rule, it is advisable, after such demand for specific relief, to demand general relief, that is "for such other and further relief as the equity of the case may warrant."[29] If there be no answer to the complaint the relief granted to the plaintiff cannot exceed that which he shall have demanded in his complaint, but if there be an answer to the complaint the court may grant to the plaintiff any relief which is consistent with the case made by the complaint and embraced within the issue.[30]

25. Bohall v. Diller, 41 Cal. 532.
26. Mallory v. Thomas 98 Cal. 646.
27. Code of Civil Procedure, Sec. 426.
28. Code of Civil Procedure, Sec. 667.
29. Lube Eq. Pl. 170.
30. Code of Civil Procedure, Sec. 580.

The names of the defendants in an action should be stated correctly.

The middle initial letter of a person's name is in law no part of his name.[31]

A mistake in the name of a party to an action in a pleading may be corrected by leave of the court.[32]

If the plaintiff be ignorant of the name of a defendant he must state that fact in the complaint, and may designate such defendant in the pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly.[33]

When such defendant is served with the summons he must appear in the action, otherwise his default may be entered for his failure so to appear.[34]

Under the Code system of pleading it is not necessary to set forth in a pleading the items of the account therein alleged, but there must be delivered to the adverse party within five days after a demand in writing therefor, a copy of the account or the party pleading such account will be precluded from giving evidence thereof, and if the account so delivered be too general or is defective in any particular, the court or judge may order a further account to be delivered. (a).

When such account or bill of particulars has been delivered, the plaintiff who intends to preclude his adversary from proving an account on the ground that he has not complied with a demand or order for the particulars of such account, should apply to the court for such an order before the trial. (b).

It is only where a party has failed or refused to deliver to the adverse party on demand a copy of his account that the latter is entitled to an order that the former be precluded from giving evidence of such account in support of his complaint.[35]

The plaintiff may on the trial, explain the items of the

31. Bliss Code Pl. Sec. 146a.
32. Code of Civil Procedure, Sec. 483.
33. Code of Civil Procedure, Sec. 474.
34. Brock v. Martinovich et al., 55 Cal. 516.
a. Code of Civil Procedure, Sec. 454.
b. Conner v. Hutchinson, 17 Cal. 279.
35. Hart v. Spect, 62 Cal. 187.

bill of particulars, or of the copy of the account, or the error, if any, therein.[36]

In pleading a judgment or other determination of a court, officer, or board, it is not necessary to state facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made; and if such allegation be controverted, the party pleading must establish on the trial the facts conferring jurisdiction.[37]

A party to an action wishing to avail himself of the provisions of this section in respect to pleading such judgment or other determination, should comply strictly with the terms of the section as to such pleading.[38]

In pleading the performance of conditions precedent in a contract it is not necessary to state the facts showing such performance, but it may be stated generally, that the party duly performed all the conditions on his part, and if such allegation be controverted, the party pleading must establish, on the trial, the facts showing such performance.[39]

The provisions of this section as to pleading the performance of conditions precedent do not include the pleading of a condition precedent prescribed by statute ;[40] and it applies only to the pleading of the performance of a condition precedent expressed in a contract.[41]

If the conditon precedent be not in a contract, but is prescribed by a statute, the facts showing the performance of such condition precedent must, as a general rule, be pleaded.[42]

In an action on a contract in which there are mutual and dependent conditions, neither party can maintain the action without the performance, or an offer to perform on his part, the conditions of the contract; and this must be shown in the pleading of the party.[43]

If the offer to perform be in writing as provided in section 1496 of the Civil Code, an allegation by a party to a con-

36. Graham v. Harmon, 84 Cal. 181, 184.
37. Code of Civil Procedure, Sec. 456.
38. Young v. Wright, 52 Cal. 407, 410.
39. Code of Civil Procedure, Sec. 457.
40. Rhoda v. Alameda County, 52 Cal. 350.
41. Bliss Code Pleading, Sec. 302.
42. Stephens on Pleadings, 334.
43. Hill v. Grigsby, 35 Cal. 656.

tract, of such offer in writing to perform is sufficient, unless the other party signified his acceptance of such offer.[44]

Under the Code system of pleading the statute of limitations may be pleaded by stating generally that the cause of action is barred by the provisions of section —— (giving the number of the section and subdivision thereof, if it is so divided, relied upon) of the Code of Civil Procedure, but, if such allegation be controverted, the party pleading must establish on the trial, the facts showing that the cause of action is so barred.[45]

In pleading a private statute or a right derived therefrom, it is sufficient to refer to such statute by its title and the day of its passage.[46]

It is not necessary to state in the complaint in an action for libel or slander, any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it is sufficient to state generally that the same was published or spoken concerning the plaintiff;[47] and in such action the defendant in his answer may allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages.[48]

By the provisions of said section 460, what was called in common law pleadings in an action for libel or slander the *inducement* and the *colloquium* may be omitted from the pleading.[49]

Under the Code system of pleading every material allegation of the complaint not controverted by the answer must, for the purposes of the action, be taken as true; the statement of any new matter in the answer in voidance or constituting a defense or counter claim, must on the trial, be deemed controverted by the opposite party.[50]

A material allegation in a pleading is one essential to the

44. Peckham v. Stewart, 97 Cal. 147.
45. Code of Civil Procedure, Sec. 458.
46. Code of Civil Procedure, Sec. 459.
47. Code of Civil Procedure, Sec. 460.
48. Code of Civil Procedure, Sec. 461.
49. Bliss on Code Pleading, Sec. 305.
50. Code of Civil Procedure, Sec. 462.

claim or defense, and which could not be stricken from the pleading without leaving it insufficient.[51]

The plaintiff and the defendant respectively may be allowed, on motion, to make a supplemental complaint or answer, alleging facts material to the case occurring after the former complaint or answer.[52]

Should the plaintiff wish to have the answer verified, the complaint must be verified as provided in section 446 of the Code of Civil Procedure. When the complaint is verified, or if the state, or an officer of the state in his official capacity, is plaintiff, the answer must be verified, unless an admission of the truth of the complaint might subject the party to a criminal prosecution, or unless an officer of the state in his official capacity is defendant.[53]

51. Code of Civil Procedure, Sec. 463.
52. Code of Civil Procedure, Sec. 464.
53. Code of Civil Procedure, Sec. 446.

CHAPTER IX.

OF THE PROCEEDINGS ON THE PART OF THE DEFENDANT AFTER HE IS SERVED WITH THE SUMMONS IN AN ACTION.

A defendant must appear and demur or answer to the complaint in the action within the time he is notified to answer by the summons served on him, or his default for not appearing may be entered.

The time to answer, may, after appearance, and for good cause shown, be extended by an order of a judge of the court as prescribed in section 1054 of the Code of Civil Procedure.

That section provides for the cases in which, and the times for which, an extension can be had. The judge, however, cannot extend the time provided by the code in which a thing must be done, for a longer period than thirty days without the consent of the adverse party, unless the party applying for the extension of time is actually engaged in attendance upon a session of the legislature of this state, as a member thereof, in which case it will be the duty of the judge to extend such time until such session of the legislature adjourns and not exceeding thirty days thereafter.[1]

Should the defendant deem that the summons or the service of the summons in the action is defective, he may move the court on notice, to quash or set aside the summons or the service of the summons.[2]

If the evidence of the service of a summons be an affidavit, the affidavit of such service must show affirmatively compliance with all the requirements of law;[3] and a judgment by default founded on an affidavit of the service of the summons which

1. Code of Civil Procedure, Sec. 1054.
2. Peck v. Strauss, 33 Cal. 679, 685.
3. McMillan and wife v. Reynolds, 11 Cal. 372.

does not affirmatively show a compliance with all the requirements of law is erroneous, and will be cause for a reversal of the judgment in the action upon an appeal.[4]

If the judgment recites a due service of process without specifying how the service was made, and without referring to any paper as proof of it, the recital is conclusive on the parties in a collateral attack, unless it should affirmatively appear in some manner from other portions of the record (the judgment roll) that the recital is untrue.[5]

On an appeal from a judgment, however, the recital in the judgment of the service of the summons on a defendant in the action will not be accepted as a substitute for the proof of the service of a summons when the judgment is directly attacked on such appeal.[6]

Should the defendant appear for the special purpose of moving to set aside the summons in the action or the service thereof, and if the court denies the motion, a general appearance thereafter and an answer to the complaint in the action do not waive the right of the defendant, or cure the error in denying the motion, if erroneous.[7]

The appearance of the defendant to make such motion should be a special appearance for that purpose, and not a general appearance in the action; and if the defendant should specially appear to ask for an extension of time to make such motion and to plead, that fact would not make such appearance a general appearance in the action.[8]

A general appearance of a defendant in an action is equivalent to a personal service of the summons and of a copy of the complaint in the action on such defendant.[9]

Before answering in the action, the attorney should examine carefully the complaint, and each cause of action, if more than one, therein set forth.

If it appear from the face of the complaint, that the plain-

4. Horton v. Gallardo, 88 Cal. 581.
5. Hahn v. Kelly, 34 Cal. 391, 431.
6. Weeks v. Garibaldi G. M. Co., 73 Cal. 599; McKinley v. Tuttle, 42 Cal. 577.
7. Lyman v. Milton, 44 Cal. 635.
8. Powers v. Baily, 75 Cal. 239.
9. Lyons v. Roach, 84 Cal. 29.

tiff has not the legal capacity to sue, or that there is another action pending between the same parties for the same cause, or that there is a defect or misjoinder of parties plaintiff or defendant, or that several causes of action have been improperly united, the defendant may demur to the complaint for such defects, or any of them, appearing on the face of the complaint.

The defendant may also at the same time demur to the complaint, and to each cause of action therein stated, if it appear on the face of the complaint that the complaint or that the statement therein of any cause of action is ambiguous, unintelligible, or uncertain.

Such demurrer must distinctly specify the grounds upon which any of the objections to the complaint are so taken by demurrer or the demurrer may be disregarded.[10]

If any of such objections to the complaint do not appear on the face of the complaint, they may be taken by answer;[11] and if no such objections be taken by demurrer or answer, they must be deemed to have been waived.[12]

The grounds above mentioned for a demurrer to a complaint must appear on the face of the complaint.[13]

The defendant must specify in his demurrer wherein the complaint is ambiguous, wherein it is unintelligible, and wherein it is uncertain.[14]

The defendant may also, at the time when he demurs to the complaint on the grounds above stated, and in the same demurrer, demur to the complaint on the ground that it appears on the face of the complaint that the court has no jurisdiction of the person of the defendant, or of the subject of the action; the defendant may also demur to the complaint, or to one or more of the causes of action stated therein, on the ground that it does not state facts sufficient to constitute a cause of action against the defendant. The defendant may demur on any or all of the grounds stated in section 430 of the Code of Civil Procedure.

10. Code of Civil Procedure, Secs. 430, 431.
11. Code of Civil Procedure, Sec. 433.
12. Code of Civil Procedure, Sec. 434.
13. Wilhoit v. Cunningham, 87 Cal. 459.
14. Kraner v. Halsey, 82 Cal. 212.

If the statement of any cause of action contained in a complaint fails to show facts essential to a recovery, an objection to the complaint, or to a cause of action contained therein, for such defect may be made, by a general demurrer.

If, however, the complaint states such essential facts, but states them defectively, the defect can only be reached by a special demurrer, particularly designating the specific point at which it is aimed.[15]

If the complaint contains several counts and the defendant demurs to the whole complaint, the demurrer should be over-ruled if there be one good count in the complaint.[16]

The objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action, is not waived by a failure of the defendant to demur to the complaint.[17]

A defendant may demur and answer at the same time, and such answer is not a waiver of the right to have the demurrer passed on by the court.[18]

But when a plaintiff who demurs to a cross complaint afterwards and before the demurrer has been ruled on by the court, answers the cross-complaint, such answer is a waiver of the demurrer.[19]

When a demurrer to a complaint is over-ruled and the defendant then answers, such answer is a waiver of the demurrer, if the demurrer be for mere formal defects; but if the demurrer be for defects in the complaint which are substantial, such as the misjoinder of causes of action, and the defendant answers after the over-ruling of a demurrer, which was on the ground of such misjoinder, such answer is not a waiver of the demurrer.[20]

When a demurrer to a complaint is sustained, leave to file amendments to the complaint, or to file an amended complaint, within a reasonable time, should be granted by the

15. Harnish v. Bramer, 71 Cal. 156, 158.
16. Cassidy v. Cassidy, 63 Cal. 352.
17. Code of Civil Procedure, Sec. 434.
18. Curtis v. Bachman, 84 Cal. 218.
19. Booth v. Chapman, 59 Cal. 150.
20. Reynolds v. Lincoln, 71 Cal. 190; Thalin v. Stewart, 100 Cal. 374.

court, unless the complaint is so defective that it cannot be made good by any amendment.[21]

The amendment, or the amended complaint, must be served on the defendants affected thereby, who must answer the amendment or the amended complaint, within ten days after such service, or within such other time as the court may direct, or judgment by default may be entered upon failure to answer, as in other cases.[22]

A demurrer is an answer within the meaning of the provisions of the Code of Civil Procedure which authorizes the entry of the default of a defendant for failure to answer;[23] and the defendant may answer by a demurrer such amendment, or such amended complaint, should he deem the objection thereto by demurrer would be well taken.

Before answering, the defendant should, under the provisions of section 453 of the Code of Civil Procedure, move the court to strike out all the irrelevant and redundant matter in the complaint.

Allegations of conclusions of law are irrelevant under our system of pleading and should be stricken out, unless, in some cases, when such conclusions of law are based on facts alleged in the pleading. Adjectives and adverbs unnecessarily inserted in the complaint should be stricken out.

If this course be pursued, the labor of preparing an answer to a verified complaint will be much decreased, and the answer be made more concise and intelligible than it would be if all of such irrelevant and redundant matters were left in the complaint.

A defendant is entitled to an inspection of the original instrument on which an action is brought and a copy of which is contained in the complaint or is annexed thereto, upon a written demand for such inspection served upon the adverse party or his attorney and filed with the papers in the case;[24] and he is entitled within five days after the service of a written

21. Lord v. Hopkins, 30 Cal. 76.
22. Code of Civil Procedure, Sec. 432.
23. Oliphant v. Whitney, 34 Cal. 27.
24. Code of Civil Procedure, Sec 449.

demand therefor, on the adverse party, to a copy of the account sued on in the action.[25]

Either party to an action is entitled to an order of the court, upon notice to the adverse party, that he have an inspection and copy, or permission to take a copy of entries of accounts in any books, or any document or paper in the possession of such other party or under his control containing evidence relating to the merits of the action or the defense therein.[26]

The defendant may also, should he deem it necessary before answering, take the deposition of the plaintiff, or of an officer or member of a corporation which is plaintiff, or of a person for whose immediate benefit the action is prosecuted, as provided in the Code of Civil Procedure in sections 2021-2032.

A defendant must demur or answer within the time specified in the summons, or his default for not so doing may be entered, unless the time to answer is extended by stipulation of counsel, or by an order of a judge of the court made as provided in section 1054 of the Code of Civil Procedure.[27]

If the complaint be not verified, the defendant may controvert, in his answer, the material allegations in the complaint by a general denial of such allegations.

Such denial puts in issue the material allegations in the complaint.[28]

A general denial of the allegations in the complaint does not make admissible evidence of new matter constituting a defense, such as accord and satisfaction, release, former recovery, etc., but such new matter must be pleaded in the answer.[29]

Anything which shows that the plaintiff never had the right of recovery at all, or to the extent that he claims, on the case he makes, may be given in evidence upon an issue raised by a general denial, in the answer of the allegations in the complaint. When, however, something is relied on by the defendant which would not be so put in issue, this is new

25. Code of Civil Procedure, Sec. 454.
26. Code of Civil Procedure, Sec. 1000.
27. McDonald v. Sweet, 76 Cal. 259.
28. Code of Civil Procedure, Sec. 437.
29. Piercy v. Sabin, 10 Cal. 22; 21 Cal. 51; 30 Cal. 472.

matter, which the defendant must state in his answer, before he can prove it by evidence.[30]

The decision of the Supreme Court in McLarren v. Spalding, 2 Cal. 510, that evidence is admissible to prove most of the matters in discharge of an action, under a general denial of the allegations of the complaint, which would have been admissible under a plea of the general issue, in the common law system of pleading, has been over-ruled by later decisions of the Supreme Court.

If the complaint be verified the denial of the material allegations in the complaint must be specific, and must be made positively, or according to the information and belief of defendant. If, however, the defendant has no information or belief upon the subject sufficient to enable him to answer an allegation of the complaint, he may so state in his answer and place his denial on that ground.[31]

If a defendant knows before answering that he could certainly ascertain whether or not an allegation in the complaint be true, a denial of such allegation on the ground of a want of information or belief sufficient to enable him to answer such allegations, is evasive, and it is not a denial within the intent and meaning of section 437 of the Code of Civil Procedure;[32] and if the facts alleged in the complaint are presumably within the knowledge of a defendant, he must answer positively and not upon information and belief,[33] unless he shows in his answer how it happened that he was without knowledge as to such facts.[34]

In denying an allegation of a complaint upon the ground of want of information or belief upon the subject sufficient to enable the defendant to answer such allegation, the language of the provisions of section 437 in respect to a denial on such grounds, should be substantially followed.[35]

A denial of an immaterial allegation of a complaint raises no issue of fact.

30. Bridges v. Paige, 13 Cal. 642.
31. Code of Civil Procedure, Sec. 437.
32. Mulcahy v. Buckley, 100 Cal. 487.
33. Gribble v. Columbus Brewing Co., 100 Cal. 67; Loveland v. Garner, 74 Cal. 300.
34. Brown v. Scott, 25 Cal. 196.
35. Naftzger v. Gregg, 99 Cal. 87.

Such immaterial allegation and the answer thereto should be disregarded.

A denial of a conclusion of law resulting from the facts alleged in a complaint raises no issue of fact, and if the facts alleged be not denied, such facts are admitted to be true.[36]

Matter of evidence alleged in the complaint need not be denied by the defendant in his answer.[37]

An affirmative allegation in an answer, which is inconsistent with a material allegation in the complaint raises an issue of fact.[38]

Every material allegation of the complaint not controverted by the answer, must for the purposes of the action, be taken as true.[39]

Therefore the answer to a material allegation in a verified complaint must not only specifically deny, so far as is consistent with truth, each material part of such allegation, or such material part of the allegation which is not so denied will for the purposes of the trial be taken to be true; and it is important that the answer to a verified complaint be so framed that it contains not only a specific denial of a material allegation in the complaint, but also a specific denial of each material part of the allegation which the pleader intends to controvert in his answer.

A careful consideration of the material allegations in a verified complaint will enable the pleader to do this without difficulty and without danger to his client, especially if he has had stricken out of the complaint, by the court, all irrelevant and redundant matter, including improper allegations of conclusions of law and of inferences of fact and matters of evidence, before answering the complaint.

When allegations of material facts in the complaint are in the conjunctive, the denial of such allegations should be in the disjunctive.[40]

The following are cases in which the denials in the answer to material allegations in a verified complaint have been held

36. Nelson v. Murray, 23 Cal. 338; Curtis v. Richards, 9 Cal. 38.
37. Jones v. Petaluma, 36 Cal. 233; Larco v. Casaneuava, 30 Cal. 561.
38. Perkins v. Brock, 89 Cal. 322; Churchill v. Baumann, 95 Cal. 545.
39. Code of Civil Procedure, Sec. 462.
40. 30 Cal. 211; 38 Cal. 290; 31 Cal. 194.

to be insufficient: In Towdy v. Ellis, 22 Cal. 659, a denial that the property was of the value of the precise sum stated in the complaint to be its value, was held to be an admission that the value of such property was any lesser sum.

To the same effect is the case of Masters v. Lash, 61 Cal. 624.

In Kinsey v. Wallace, 36 Cal. 462, it was held that when an answer denies only the wrongful character of acts alleged in the complaint, such acts are admitted to have been done.

In Feely v. Shirley, 43 Cal. 369, it was held that when it was alleged in the complaint that the plaintiff was the owner and in possession of a ditch and flume constructed for conducting water, and that the defendant wrongfully and unlawfully pulled down and destroyed the flume and diverted the water, an answer which denied such acts were wrongfully and unlawfully done, was an admission that such acts were done by the defendant.

In Lay v. Neville, 25 Cal. 545, it was held that when acts are alleged in the complaint to have been wrongfully and unlawfully done by the defendant, a denial in the answer that such acts were wrongfully and unlawfully done was an admission that they were done.

To the same effect is the case of Woodsworth v. Knowlton, 22 Cal. 164, and the case of De Godey v. Godey, 39 Cal. 157.

An allegation in the complaint in an action to recover the possession of personal property, of the place where the property was taken, is surplusage.[41]

A denial of indebtedness without a denial of any of the alleged facts from which such indebtedness arose raises no issue.[42]

Qualified and copulative denials in an answer relating to a contract alleged in a complaint, are insufficient to raise a substantial issue.[43]

It was a rule at common law in respect to pleadings that a plea to a declaration must be either by way of traverse or by confession and avoidance.[44]

41. Lay v. Neville, 25 Cal. 545.
42. Curtis v. Richards, 9 Cal. 34.
43. Mulcahy v. Buckley, 100 Cal. 484.
44. Stephens on Pleading, 139.

At common law, pleas by confession and avoidance were distinguished as pleas in justification, or excuse, or pleas in discharge.

In the plea in justification or excuse, facts were alleged which showed that the defendant never had a cause of action, because the act charged in the declaration was lawful.

In the plea in discharge, facts were alleged which showed that though the plaintiff once had a right of action, it was discharged or released by some matter subsequent.[45]

Under the Code system of pleading, if the defendant cannot truthfully controvert facts alleged in the complaint by a denial, he may, if he can do so truthfully, controvert such facts by an answer in the nature of a plea of confession and avoidance at common law. Facts, however, must be alleged in such answer, and not merely conclusions of law.

The rule at common law that a plea must not be double, that is, it must not contain several matters in abatement or several matters in bar, or one matter in abatement and another in bar,[46] has no application to the Code system of pleading. Under the Code system, the defendant may set forth in his answer as many defenses and counter claims as he may have;[47] that is, he may in the same answer controvert the allegations of the complaint by denials; he may controvert them, or any of them by way of confession and avoidance; he may set out in his answer matters in abatement of the action, if such matters in abatement do not appear on the face of the complaint, and matters in bar of the action, and matters of counter claim.

The effect of a plea in abatement at common law was, if successful, to defeat the particular action in which such plea was made.

The effect of a plea in bar at common law was, if successful, to defeat or bar the action for all time.[48]

Under the liberal provisions of section 473 of the Code of Civil Procedure, in respect to amendments, an answer containing a plea in abatement of an action will be of little advantage

45. Stephens on Pleading, 199.
46. Stephens on Pleading, 251-9.
47. Code of Civil Procedure, Sec. 441.
48. Stephens on Pleading, 51; Chitty Pleading, 481.

to a defendant, since the effect of the plea can readily be obviated, in most cases, by amendments made by permission of the court.

A plea in abatement, however, of the pendency of a former action for the same cause of action, and when the plaintiff in both actions was the same, cannot be obviated by such amendment.

If the defendant recover judgment on the issue raised by such plea of the pendency of a former action, the judgment should be a judgment abating the subsequent action.[49]

A plea in abatement may be set up in an answer to a complaint in an action of persons doing business as partners under a fictitious name, upon transactions had in their partnership name, who have not complied with the provisions of the Civil Code in respect to persons in California transacting business under a fictitious name.[50]

A plea in abatement may be set up in answer in an action commenced by a corporation for a cause of action mentioned in section 299 of the Civil Code, unless such corporation has complied with the provisions of that section in respect to filing a copy of its articles of incorporation as provided for in that section. Such pleas in abatement and the effect thereof cannot be obviated by an amendment to the complaint.

In addition to the defenses pleaded in the answer of a defendant, the defendant may state facts showing a counter claim, arising out of one of the following causes of action, namely:

1. A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

2. In an action arising upon contract; any other cause of action arising also upon contract, and existing at the commencement of the action.[51]

If a defendant omit to set up a counter claim in the cases mentioned in the first subdivision of such section, neither

49. Coubrough v. Adams, 70 Cal. 374, 380.
50. Civil Code, Sec. 2468.
51. Code of Civil Procedure, Sec. 438.

he nor his assignees can afterwards maintain an action against the plaintiff therefor.[52]

A defendant may set forth in his answer as many defenses and counter claims as he may have, but they must be separately stated; these several defenses must refer to the causes of action which they are intended to answer in such way that it may be known to what causes of action set out in the complaint each defense refers;[53] and in the same section it is provided that a defendant may answer one or more of several causes of action stated in the complaint and demur to the others.

A person will not be deprived of the benefit of the counter claim he has against another person by reason of the death of such other person, or by reason of any assignment by him, where cross demands exist between them under such circumstances that if one had brought an action against the other the cross demand of the other could have been set up as a counter claim; but such cross demands shall be deemed compensated so far as they are equal to each other.[54]

A defendant, except in his denials in his answer, must state in his answer the ultimate facts which constitute his defense, or counter claim.

It is provided in section 442 of the Code of Civil Procedure that whenever the defendant seeks affirmative relief against any party relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross complaint. The cross complaint must be served upon all the parties affected thereby, although they are co-defendants in the action;[55] and such parties may demur or answer thereto as to the original complaint. A cross complaint must contain in itself allegations of facts sufficient to entitle the cross complainant to affirmative relief.[56]

A counter claim is a cause of action arising out of the transaction set forth in the complaint as the foundation of the

52. Code of Civil Procedure, Sec. 439.
53. Code of Civil Procedure, Sec. 441.
54. Code of Civil Procedure, Sec. 440.
55. Hibernia S. and L. Society v. Clarke, 110 Cal. 32.
56. Coulthurst v. Coulthurst, 58 Cal. 239.

plaintiff's claim, or connected with the subject of the action.

A defendant sometimes may seek by his counter claim, affirmative relief against the plaintiff.

In a cross complaint a defendant may seek affirmative relief not only against the plaintiff, but also against co-defendants, and he may, if the facts stated in the cross complaint show that a complete determination of the controversy cannot be had without the presence of other persons who are not parties to the action, obtain an order of the court that such other persons be brought in by summons to answer the cross complaint.[57]

The statement of new matter in the answer in avoidance, or constituting the defense of counter claim, must, on the trial, be deemed controverted by the opposite party;[58] but parties against whom affirmative relief is sought by a cross complaint must demur to, or answer, such cross complaint.[59]

The defendant in the action is, as to a cross complaint, the plaintiff, and the plaintiff and other persons against whom relief is claimed in a cross complaint, are as to matters alleged in the cross complaint, defendants; and every material allegation in such cross complaint not controverted by an answer thereto, must for the purposes of the action be taken to be true on a trial of the action.[60]

It is important, therefore, that a plaintiff should know whether matters set out in a pleading of the defendant constitute a cross complaint, or a counter claim. If a cross complaint, then such matters will for the purposes of the trial be taken to be true, unless controverted by answer; if a counter claim, then such matters are deemed controverted without answer.

The difference between a cross complaint and a counter claim has not been clearly designated by our Supreme Court. In a counter claim the relief demanded is against the plaintiff in the action alone, while in a cross complaint the relief demanded may be against the plaintiff and against others who are in effect made parties defendants in the cause of action alleged in the cross complaint.

There are cross complaints, however, in which the relief

57. Winter v. McMillan, 87 Cal. 265.
58. Code of Civil Procedure, Sec. 462.
59. Code of Civil Procedure, Sec. 442.
60. Code of Civil Procedure, Sec. 462; Herold v. Smith, 34 Cal. 122, 124.

demanded is against the plaintiff alone, as in a cross complaint in an action for divorce;[61] in an action to quiet title to real estate;[62] in an action to restrain the diverting of water;[63] in an action to have a deed declared a mortgage;[64] in an action of ejectment.[65]

Under the Code system of pleading in New York, the plaintiff must reply to the counter claim contained in the answer if he wishes to controvert the allegations therein.[66]

And in the same state a counter claim in the answer of the defendant was held to embrace all matters which formerly could be pleaded either by way of recoupment or set off, and that such counter claim secured to the defendant all the relief which either an action at law or a bill in equity or a cross bill would have secured under the same state of facts, but that a cross action might still be necessary for the protection of a defendant when he sought to have new parties brought in.[67]

While there is uncertainty, as there must be in some cases, as to whether a pleading on the part of the defendant is a cross complaint or a counter claim, it will be a matter of prudence on the part of the plaintiff to answer it. In New York, and in the Code states which require new matter stated in the answer of a defendant to be replied to, such replication applies to all new matter, whether such new matter be a counter claim or a cross complaint.

Sham and irrelevant answers in a pleading may be stricken out on motion.[68]

A sham answer is one that is good in form, but false in fact and pleaded in bad faith.[69]

A court should not strike out an answer as sham when the motion to strike out is based solely on affidavits;[70] nor when the answer is verified if it sets up a sufficient defense.[71]

61. Wadsworth v. Wadsworth, 81 Cal. 182.
62. Winter v. McMillan, 87 Cal. 256.
63. Van Bibber v. Hilton, 84 Cal. 585.
64. Taylor v. McLain 64 Cal. 513.
65. Nunez v. Morgan, 77 Cal. 427.
66. Baylies on Code Pleading, p. 267, 268.
67. Baylies on Code Pleading, p. 16.
68. Code of Civil Procedure, Sec. 453.
69. Gostorfs v. Taaffe, 18 Cal. 387.
70. Fay v. Patterson, 51 Cal. 315.
71. Greenbaum v. Turrill, 57 Cal. 285.

An answer to a complaint, and one or more of several defenses or counter claims set forth in the answer, may be demurred to within the same length of time after service of of the answer, as is allowed to answer after service of summons in the action, and upon the following grounds, namely:

1. That several causes of counter claims have been improperly joined.

2. That the answer does not state facts sufficient to constitute a defense or counter claim.

3. That the answer is ambiguous, unintelligible or uncertain.[72]

All pleadings must be filed with the clerk and copies thereof served upon the opposite party or his attorney.[73]

72. Code of Civil Procedure, Secs. 443, 444.
73. Code of Civil Procedure, Sec. 465.

CHAPTER X.

OF AMENDMENTS AND AS TO RELIEF FROM JUDGMENTS, ORDERS OR OTHER PROCEEDINGS TAKEN AGAINST A PARTY THROUGH HIS MISTAKE, SURPRISE OR EXCUSABLE NEGLECT.

Any pleading may be amended once by the party, of course, at any time before answer or demurrer filed, or after demurrer and before the trial of the issue of law thereon.[1]

The pleading as amended must be filed, and a copy thereof served on the adverse party, who may have ten days thereafter in which to answer or demur thereto.[2]

A plaintiff may amend his complaint without leave of the court at any time before the issuance of a summons, if there has been no appearance of the defendant in the action.[3]

Amendments by adding or striking out the name of a party or by correcting a mistake in any other respect, should be granted by the court on such terms as may be proper and just; and the court, upon terms that may be just and proper, may enlarge the time to answer or demur. The court may also, and upon like terms in its discretion, and after notice to the adverse party, allow amendments in other particulars.[4]

Courts should be liberal in allowing amendments to pleadings, to the end that cases may be fully and fairly presented on their merits.[5]

When the allowing of an amendment is a matter of discretion of the trial court, the Supreme Court will not interfere

1. Code of Civil Procedure, Sec. 472.
2. Code of Civil Procedure, Sec. 472; Lord v. Hopkins, 30 Cal. 76.
3. Allen v. Marshall, 34 Cal. 165.
4. Code of Civil Procedure, Sec. 473.
5. Hayden v. Hayden, 46 Cal. 337; Burns v. Scooffy, 98 Cal. 276.

with the exercise of that discretion, unless the case be one of an abuse of discretion.[6]

A motion to amend is always in time when it immediately follows an objection to the sufficiency of the complaint or answer.[7]

An amended cross complaint may be permitted by the court, on notice to the adverse party, to be filed after the case had been submitted, in order that the allegations of the cross complaint may conform to the proofs.[8]

An amendment on such terms as may be just, should be permitted on the trial of an action to enable the party asking to amend, properly to present his case.[9]

When a complaint is amended, naming a person as a defendant who was not attempted to be named as a defendant in the original complaint, and who has not been served with a summons in the action, a judgment against such person by default is void unless he has made a general appearance in the action.[10]

When an amendment to a complaint is made by inserting therein the true name of a person who was sued by a fictitious name, and who was served with the summons in the action, service of the complaint as so amended or of the amendment is not necessary, and such service would not extend the time of such person to answer the complaint in the action.[11]

An amended pleading takes the place of the original,[12] except so far as the plea of the statute of limitations is affected thereby, when the amended and original complaint state the same cause of action.[13]

If the amended complaint state a cause of action not stated in the original complaint, then, as to such new cause of action, not stated in the original complaint, the amended

6. Wixen v. Devine, 91 Cal. 477.
7. Valencia v. Couch, 32 Cal. 344.
8. Jackson v. Jackson, 94 Cal. 446.
9. Stringer v. Davis, 30 Cal. 318; Guidery v. Green, 95 Cal. 630; Farmers' G. Bank v. Stover, 60 Cal. 387.
10. Powers v. Baily, 75 Cal. 237.
11. Brock v. Martinovich, 55 Cal. 516.
12. Collins v. Scott, 100 Cal. 453; Schneider v. Brown, 85 Cal. 205.
13. White v. Soto, 82 Cal. 654.

complaint is to be deemed to be the commencement of the action, so far as the plea of the statute of limitations is affected thereby.[14]

The amendment of a pleading in a matter of substance is a waiver of the default of a defendant for failure to answer the original pleading, and a copy of the amended pleading must be served on such defendant.[15]

The trial court has the same right to exercise its discretion in determining the time within which an answer or demurrer is to be filed to an amended pleading which it allows, as it has in determining whether it will allow such amended pleading.[16]

The trial court, in the exercise of its discretion, may relieve a party or his legal representative from a judgment order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect, provided that application be made therefor within a reasonable time, not exceeding six months after such judgment order or proceeding was taken.[17]

This power of the court should be liberally exercised.[18]

When from any cause the summons in an action has not been personally served on a defendant therein, the court may allow, on such terms as may be just, such defendant or his legal representative at any time within one year after the rendition of any judgment in such action to answer to the merits of the original action.[19]

Application for permission to answer after a default for a failure to answer, should be accompanied by a copy of the proposed answer, which the applicant asks permission of the court to file, or by an affidavit of merits.

The court should in every stage of an action disregard any error, improper ruling, instruction or defect in the pleading or proceedings which in the opinion of the court does not affect the substantial rights of the parties; and there shall be no presumption that any such error is prejudicial, or that injury has been done, if error is shown.[20]

14. Anderson v. Mayers, 50 Cal. 527.
15. Reinhart v. Lugo, 86 Cal. 397.
16. Schultz v. McLean, 109 Cal. 443.
17. Code of Civil Procedure, Sec. 473.
18. Burns v. Scooffy, 98 Cal. 276.
19. Code of Civil Procedure, Sec. 473.
20. Code of Civil Procedure, Sec. 475, as amended in 1897.

No variance between the allegations in a pleading and the proof is to be deemed material unless it has actually misled the adverse party to his prejudice; and when it appears that such adverse party has been so misled, the court may order the pleadings to be amended on such terms as may be just.[21]

When the variance is not material, the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs.[22] But if the allegation of the claim or defense to which the proof is directed is unproved in its general scope or meaning, it is to be deemed a case of failure of proof, and not one of variance.[23]

21. Code of Civil Procedure, Sec. 469.
22. Code of Civil Procedure, Sec. 470.
23. Code of Civil Procedure, Sec. 471.

CHAPTER XI.

OF SOME RULES OF PLEADING UNDER THE CODE SYSTEM.

1. The allegations in a pleading must be allegations of material ultimate facts, and not allegations of probative facts, of evidence, or of conclusions of law.

2. The denial in a pleading of evidence, of immaterial facts, or of conclusions of law, raises no issue of fact.

3. If the complaint be verified, the denial in the answer must be so specific that it is a denial of each and every part of the material allegations of the complaint, and the part of the material allegations in the complaint not so specifically denied is for the purpose of the action to be taken to be true.

4. Allegations in a complaint should be consistent.

5. A demurrer is an admission of the truth of the facts alleged in a pleading to which the demurrer is interposed.

6. When several defenses are alleged in an answer, and which are separately stated, an admission made in one of such defenses for the purpose of pleading a separate defense does not destroy the effect of a denial in another defense of the matter thus admitted.[1]

In personal actions the pleadings should allege a time when each traversable fact occurred, and when there is occasion to mention a continuous act, the period of its duration ought to be stated; the exact time as stated need not be established by the evidence, unless it is material.[2] When a party to an action has occasion to justify under a writ, warrant or any other authority, he should set forth the authority in his pleading,[3] It is not necessary to state matter in a pleading of which the

1. Siter v. Jewett, 33 Cal. 93.
2. Gould's Pleadings, Sec. 63.
3. Stephens' Pleadings 329.

court takes notice judicially.[4] It is not necessary to state in a pleading what the law will presume.[5] Pleadings as a general rule should not be hypothetical, or in the alternative; and allegations in a pleading should not be by way of recital, but they should be positive in their form.[6] It is a general rule that if there be an exception in the general clause of a written instrument, the party pleading must show that his adversary is not within the exception, but a proviso in the instrument need not be noticed by such pleader, but it must be pleaded by the opposite party.[7] A contract or instrument in writing may be set out in the words of the contract or instrument, or pleaded according to its legal effect.[8] When the right to recover judgment depends on the non-performance of an act by the opposite party, such non-performance must be alleged; when the performance of a contract, or the full performance thereof, is prevented by the acts of the opposite party, such prevention should be alleged; and when the performance or the full performance of a contract is prevented by acts over which the party had no control, and it be material in an action that such prevention be shown in evidence, it should be alleged.

A party to an action is not required to state matters which would more properly come from the other side.[9]

In California, actions for the recovery of, quieting title to, or for the enforcement of liens upon real estate, must be commenced in the county in which the real estate or some part thereof, affected by such actions, is situated; and in such actions, an allegation showing the counties or county in which such real estate is situated, is material.

4. Stephens' Pleadings 346.
5. Stephens' Pleadings 354.
6. Stephens' Pleadings 387, 388.
7. Stephens' Pleadings 443.
8. Gould Pleadings Sec. 138.
9. Stephens' Pleadings 350.

CHAPTER XII.

OF PROVISIONAL REMEDIES.

There are actions in which at or after the commencement of the action, the plaintiff is entitled by statute to what are called provisional remedies.

ARREST AND BAIL.

In California the plaintiff is entitled to the provisional remedy of arrest and bail, in the following cases, namely:

1. In an action for the recovery of money or damages in a cause of action arising upon a contract, express or implied, when the defendant is about to depart from the state with intent to defraud his creditors;

2. In an action for a fine or penalty, or for money or property embezzled or fraudulently misapplied, or converted to his own use, by a public officer, or an officer of a corporation, or an attorney, factor, broker, agent, or clerk in the course of his employment as such, or by any other person in a fiduciary capacity; or for misconduct or neglect in office or in a professional employment, or for a wilful violation of duty;

3. In an action to recover the possession of personal property unjustly detained, when the property, or any part thereof has been concealed, removed, or disposed of, to prevent its being found or taken by the sheriff;

4. When the defendant has been guilty of a fraud in contracting the debt, or in incurring the obligation for which the action is brought; or in concealing or disposing of the property, for the taking, detention or conversion of which the action is brought.

5. When the defendant has moved or disposed of his property, or is about to do so, with intent to defraud his creditors.[1]

1. Code of Civil Procedure, Sec. 479.

The order for the arrest of the defendant must be obtained from a judge of the court in which the action is brought, and can only be obtained on an affidavit, showing that a sufficient cause of action exists, and that the case is one of the cases above mentioned. This affidavit must be positive, or upon information and belief, and when on information and belief, it must state the facts upon which the information and belief are founded, and if the order of arrest be made, this affidavit must be filed with the clerk of the court.

But before making the order, the judge must require a written undertaking on the part of the plaintiff with sureties in an amount fixed by the judge, which must be at least five hundred dollars, to the effect that the plaintiff will pay all costs which may be adjudged to the defendant, and all damages which he may sustain by reason of the arrest, if the same be wrongful, or without sufficient cause, not exceeding the sum specified in the undertaking, and the undertaking must be filed with the clerk of the court.

Such order of arrest may be made at the time of the issuance of the summons or at any time afterwards before judgment, and it must require the sheriff of the county where the defendant may be found, forthwith to arrest him and hold him to bail in a sum specified in the order, and to return the order at the time therein mentioned to the clerk of the court in which the action is pending.[2]

The defendant after his arrest and at any time before execution, must be discharged from the arrest, either upon giving bail or upon depositing the amount mentioned in the order of arrest.

If bail be given, the sheriff, must within the time limited for that purpose, file the order of arrest in the office of the clerk of the court in which the action is pending, with his return indorsed thereon, together with a copy of the undertaking of the bail. The plaintiff within ten days thereafter, may serve on the sheriff, a notice that he does not accept the bail, and within five days after the receipt of the notice, the sheriff, or the defendant, may give notice of the justification of the sureties to the same, or other bail (specifying the places of residence and occupations of the latter) before a judge of the court, or county clerk, at a spe-

2. Code of Civil Procedure, Secs. 480-83.

cified time and place, which must not be less than five nor more than ten days thereafter, except by consent of parties.

The defendant after he is arrested, may, at any time, before the trial of the action, or if there be no trial, before judgment, apply to the judge who made the order of arrest, or the court in which the action is pending, upon reasonable notice, to vacate the order of arrest or to reduce the amount of the bail; if the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other proofs, in addition to those on which the order of arrest was made; and if on the hearing of the application it appears that there was not sufficient cause for the arrest, the order must be vacated, or if it appears that the bail was fixed too high, the amount must be reduced.[3]

CLAIM AND DELIVERY.

In California, the provisional remedy of *claim and delivery* is allowed by statute in an action to recover the possession of personal property.

At the time of issuing the summons in an action for the recovery of personal property, or at any time thereafter, before answer, the plaintiff may avail himself of this provisional remedy.

In order to avail himself of such remedy an affidavit must be made by the plaintiff or by some one in his behalf, showing:

1 That the plaintiff is the owner of the property claimed (particularly describing it) or is entitled to the possession thereof.

2. That the property is wrongfully detained by the defendant;

3. The alleged cause of the detention thereof, according to his best knowledge, information and belief.

4. That it has not been taken for a tax, assessment, or fine, pursuant to a statute, or seized under an execution or an attachment against the plaintiff, or if so seized, that it is by statute exempt from such seizure;

5. The actual value of the property.

By an indorsement, in writing, upon this affidavit, the plaintiff or the attorney for the plaintiff, may require the sheriff of the county where the property claimed may be, to take the same from the defendant.

3. Code of Civil Procedure, Sec. 484 et seq.

Upon the receipt of the affidavit, and the notice or requirement indorsed thereon, with a written undertaking executed by two or more sufficient sureties approved by the sheriff, to the effect that they are bound to the defendant in double the value of the property as stated in the affidavit for the prosecution of the action, for a return of the property to the defendant, if the return thereof be adjudged, and for the payment to him of such sum as may for any cause be recoverd against the plaintiff, the sheriff must forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. The sheriff must, without delay, serve on the defendant or his agent, from whose possession the property is taken, if they can be found, a copy of the affidavit, notice or requirement, and undertaking; if they cannot be found, then, by leaving them at the usual place of abode of either, with a person of suitable age and discretion, or if they have no usual place of abode, then by putting them in the nearest postoffice, directed to the defendant. The defendant may, within two days after service of a copy of the affidavit and undertaking, give notice to the sheriff that he excepts to the sufficiency of the sureties to the undertaking; and if he does not so except, he may at any time before the delivery of the property to the defendant require a return thereof, upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property as stated in the affidavit of plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged and for the payment to him of such sum as may for any cause be recovered against the defendant; such return must be so required within five days after the taking of the property and the service of the affidavit and notice or requirement endorsed thereon, upon the defendant. If the defendant excepts to the sureties to the undertaking, given on behalf of the plaintiff, he is not entitled to give an undertaking for the return of the property.

Should any person other than the defendant or his agent claim the property and make affidavit of his title thereto or right of possession thereof stating the grounds of such title or right, and serve the same upon the sheriff, the sheriff is not bound to keep the property, or deliver it to the plaintiff unless the plain-

tiff, on demand on him or his agent, indemnify the sheriff against such claim, by an undertaking with two sufficient sureties; and no claim to such property by any person other than the defendant or his agent, is valid against the sheriff, unless so made.

In case the defendant excepts to the sureties to the undertaking executed on behalf of the plaintiff, such sureties must justify on notice to the defendant, in like manner as upon bail on arrest; and the defendant's sureties to the undertaking given on requiring a return of the property, must justify before a judge or county clerk, upon notice to plaintiff of not less than two nor more than five days in the same manner as upon bail on arrest, and upon such justification, the sheriff must deliver the property to the defendant.

If the sureties to the undertaking on behalf of the plaintiff fail to justify, or if the plaintiff fail to indemnify the sheriff against the claim of a third person making an affidavit showing his title or right to the property, the sheriff should deliver the property to the defendant; but if such sureties do so justify, and the sheriff is indemnified against the claim of such third person, if made, and a return of the property be not required and the proper undertaking given by the defendant within five days after service on defendant of a copy of the affidavit and undertaking on behalf of the plaintiff, the sheriff should deliver the property to the plaintiff.

The party who is entitled to the delivery to him of the property, must pay to the sheriff his fees for taking the property, and his necessary expenses for keeping the same.[4]

ATTACHMENT.

In California, the statute has provided a provisional remedy by attachment: First, in an action upon a contract express or implied for the direct payment of money when the contract is made, or is payable in that state, and is not secured by any mortgage or lien upon real or personal property, or pledge of personal property or, if originally so secured, when such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless; and second, in an action upon a contract express or implied, against a defendant not residing in this state.

4. Code of Civil Procedure, Secs. 509-520.

Such attachment may be issued at the time of issuing the summons in the action, or at any time thereafter.

To obtain such attachment, the plaintiff or some one in his behalf must, if the action be against a defendant who is residing in this state, make and deliver to the clerk of the court, an affidavit, showing that the defendant is indebted to the plaintiff (specifiying the amount of such indebtedness over and above all legal set-off and counter claims) upon a contract (stating it, to be express or to be implied as the fact may be) for the direct payment of money, and that such contract was made or is payable in this state, and that the payment of the same has not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property, or, showing that if originally so secured, that such security has, without any act of the plaintiff, or of the person to whom the security was given, become valueless.

In an action against a non-resident of the state, the affidavit should show that the defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all legal set-offs and counter claims) and that the defendant is not residing in the state. The affidavit must in all cases show that the attachment is not sought, and the action is not prosecuted, to hinder, delay, or defraud any creditor of the defendant.[5]

In drafting this affidavit, care must be taken not to state in the alternative that the contract was express *or* implied, and not to state in the alternative that the contract has not been secured by any mortgage or lien upon real or personal property, or pledge of personal property, *or* if originally so secured, that such security has, without any act of the plaintiff, or the person to whom the security was given become valueless.[6]

Upon receiving the proper affidavit, the clerk of the court in which the action is pending, must require a written undertaking on the part of the plaintiff in the action, in a sum of not less than two hundred dollars, and not exceeding the amount claimed by the plaintiff, with sufficient sureties to the effect, that if the defendant recover judgment the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may

5. Code of Civil Procedure, Sec. 538.
6. Hawley v. Delmas, 4 Cal. 195; Wilke v. Cohn, 54 Cal. 212.

sustain by reason of the attachment, not exceeding the sum specified in the undertaking.

Within five days after the service of the summons in the action, the defendant may except to the sufficiency of the sureties. When excepted to, they or others in their place, must, upon notice to the defendant of not less than two days nor more than five days, justify before a judge or county clerk, in the same manner as upon bail on arrest, and unless there be such justification, the judge must issue an order, vacating the writ of attachment.[7]

The statute states that the judge or clerk shall issue such order, but a clerk cannot exercise judicial functions. (An order is a direction of a court or judge.[8])

The writ of attachment may be directed to the sheriff of any county in which property of the defendant may be, and must require such sheriff to attach and safely keep all the property of the defendant within his county not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated in the writ in conformity with the complaint, unless the defendant give him security by the undertaking of at least two sufficient sureties in an amount sufficient to satisfy such demand besides costs, or in an amount equal to the value of the property, which has been, or is about to be attached, in which case to take such undertaking. Several writs may be issued at the same time to the sheriffs of different counties.[9]

After appearing in the action, the defendant may, upon reasonable notice to the plaintiff, apply to the court in which the action is pending, or to a judge thereof, for an order discharging the attachment, in whole or in part, upon the giving of an undertaking on behalf of the defendant by at least two sufficient sureties in an amount fixed by the court or judge to the effect that in case the plaintiff recover judgment in the action, the defendant will on demand re-deliver the attached property so released, to the proper officer to be applied to the payment of the judgment, or in default thereof, that the defendant and sureties will, on demand, pay to the plaintiff the full value of the property released; and on the jus-

7. Code of Civil Procedure, Sec. 539.
8. Code of Civil Procedure, Sec. 1003.
9. Code of Civil Procedure, Sec. 540.

tification by said sureties before the court or judge, if such justification be required, an order will be made, releasing from the attachment any or all the property attached.[10]

The defendant may also upon reasonable notice to the plaintiff, apply to the court in which the action is brought or to a judge thereof, for an order that the writ of attachment be discharged, on the ground that the same was improperly or irregularly issued.[11]

If the application be made on affidavits, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence, in addition to those on which the writ of attachment was issued; and if upon such application, it satisfactorily appear that the writ of attachment was irregularly or improperly issued, it must be discharged.[12]

The death of a defendant, after judgment, if no execution has been issued and levied on property which had been attached, dissolves an attachment levied on the property of the defendant.[13]

The sureties on an undertaking given on behalf of a defendant in attachment proceedings to release property from attachment, are discharged from liability, on a tender by the defendant to the plaintiff of the full amount due, and costs, and a refusal of such tender; and the money, so tendered need not be kept good nor paid into the court in order to release the sureties on such undertakings.[14]

An action, in which a writ of attachment is issued, and under the writ property of a defendant is seized, is, so far as such attached property is affected thereby, in the nature of a proceeding in rem, and the property so attached may be sold under an execution issued to enforce a judgment in the action, and the purchaser at such sale will acquire a valid title thereto in case there was a service of the summons in the action as authorized by the laws of the state in which the action was pending, although there was no personal service on such defendant of the summons issued in the action.[15]

10. Code of Civil Procedure, Sec. 555.
11. Code of Civil Procedure, Sec. 556.
12. Code of Civil Procedure, Sec. 537 et seq.
13. Ham v. Cunningham, 50 Cal. 366; Myers v. Mott, 29 Cal. 359.
14. Curiac v. Packard, 29 Cal. 194.
15. Pennoyer v. Neff, 95 U. S. 714.

Attachment proceedings are special and statutory, and the provisions of the statute must be strictly followed or no rights will be acquired thereunder.[16]

These provisional remedies which I have mentioned are wholly statutory. I have stated only the principal statutory provisions, relating to such remedies, since a fuller statement would be a mere repetition of such provisions.

These provisional remedies are given by statute in actions at law.

There are also provisional remedies in actions in equity, and the first of these which I will mention is that of

INJUNCTION.

It was always within the power of a court of equity to grant a restraining order or a preliminary injunction against threatened acts of a defendant in an action, in the following cases, namely:

1. When it appears by the complaint in the action that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the act complained of in the complaint, either for a limited period or perpetually.

2. When it appears by such complaint, or by affidavit that the commission or continuance of some act during litigation would produce waste, or great or irreparable injury to the plaintiff.

3. When it appears during litigation that the defendant is doing, threatens, or is about to do, or is procuring to be done, some act in violation of the plaintiff's rights respecting the subject of the action, and tending to render a judgment rendered in the action ineffectual.

In most of the states the issuance of a preliminary injunction as a provisional remedy is regulated by the statute law.

In California under the provisions of the statutes of that state, a preliminary injunction may be granted by the court in which an action is pending or by a judge thereof, at the time of issuing the summons upon a verified complaint, and at any time thereafter, before judgment, upon affidavits, when the complaint in the one case, and the affidavits in the other show satisfactor-

16. Gow v. Marshall, 90 Cal. 565.

ily that sufficient grounds exist therefor. No preliminary injunction, however, can continue in force for longer than twelve months from the time such injunction was granted except by consent of the parties, or unless the action be set for trial on its merits.[17]

A preliminary injunction cannot be allowed after the defendant has answered, unless upon notice or upon an order to show cause; but in such case the defendant may be restrained until the decision of the court or judge granting or refusing the injunction.[18]

On granting an injunction the court or judge must require, except when the people of the state, a county, or a municipal corporation, or a married woman in a suit against her husband, is a party plaintiff, a written undertaking on the part of the plaintiff with sufficient sureties, to the effect, that the plaintiff will pay to the party enjoined such damages not to exceed an amount to be specified in the undertaking as such party may sustain by reason of the injunction, if the court finally decides that the plaintiff was not entitled thereto. Within five days after the service of the injunction, the defendant may except to the sufficiency of the sureties. When so excepted to, the plaintiff's sureties upon notice to the defendant of not less than two nor more than five days must qualify before a judge or county clerk in the same manner as upon bail on arrest, and upon failure to so justify, or on failure of others to justify in their place at the time and place appointed, the order granting an injunction must be dissolved.[19]

An injunction cannot be granted to suspend the general and ordinary business of a corporation without due notice of the application therefor to the proper officers or managing agent of the corporation except when the people of the state are a party to the proceeding.[20]

If the court or judge deem it proper that the defendant or one of several defendants should be heard before granting the injunction, an order may be made requiring cause to be shown by such defendants at a specified time and place, why the injunc-

17. Code of Civil Procedure, Sec. 527, as amended in 1895.
18. Code of Civil Procedure, Sec. 528.
19. Code of Civil Procedure, Sec. 529.
20. Code of Civil Procedure, Sec. 531.

tion should not be granted; and the defendant or defendants may in the meantime be restrained.[21]

If an injunction be granted without notice, the defendant may at any time before the trial, upon reasonable notice given to the plaintiff, apply to the judge who granted the injunction or to the court in which the action is brought to dissolve or modify the injunction. The application may be made upon the complaint and the affidavit on which the injunction was granted, or upon affidavits on the part of the defendants, with or without the answer. If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same, by affidavits or other evidence in addition to those on which the injunction was granted.[22]

When on an application for an injunction, a restraining order has been made and granted, or may be granted, to prevent diversion, during litigation of water used, or to be used, for irrigation or domestic purposes only, if it be made to appear to the court that great damage will be suffered by the defendant in case the injunction or restraining order is granted or continued, and that the plaintiff can be fully compensated for any damages he may sustain by reason of the continuance of the acts of the defendant during the pendency of the litigation, the court, in its discretion may refuse to grant, or may dissolve or modify the injunction or restraining order, if granted, upon the defendant giving a bond, with sureties to be approved by the judge, and in such an amount as may be fixed by the judge, conditioned that the defendant will pay all damages which the plaintiff may suffer by reason of the continuance during litigation of the acts complained of.

Upon the trial the amount of such damages shall be ascertained, and in case judgment is rendered for the plaintiff, the amount fixed as such damages shall be included in the judgment, together with reasonable attorneys' fees; and upon a suit brought on the bond, the amount of damages as fixed in such judgment, shall be conclusive upon the sureties.[23]

If, upon an application to dissolve, or modify an injunction, it satisfactorily appear that there is not sufficient ground for the

21. Code of Civil Procedure, Sec. 530.
22. Code of Civil Procedure, Sec. 532.
23. Code of Civil Procedure, Sec. 532, as amended in 1887.

injunction, it must be dissolved; or if it satisfactorily appear that the extent of the injunction is too great, it must be modified.[24]

An injunction or restraining order can only be granted by a court or judge having jurisdiction in equity cases.

Under the former common law and chancery practice in England, suits were frequently brought to restrain the plaintiff in a common law action from proceeding further in the action until the suit in equity relating to the subject of the action was first determined.

Among such cases of the interference of a court of equity was the restraining of the further prosecution by the plaintiff of the common law action for the recovery of the possession of real estate where the plaintiff had the legal title to the real estate, and the defendant had an equitable defense, which he could not avail himself of in such common law action.

Under the code system of civil remedies, courts of record have jurisdiction of both common law actions, and of suits in equity; and equitable defenses can be made in common law actions, and the interference by one trial court of record with proceedings in another trial court of record is not allowed.

A party is not entitled to a remedy by injunction in a case, wherein he has a plain, speedy and adequate remedy at law.[25]

In an action upon an undertaking given on the granting of an injunction, the defendant in the injunction suit is entitled to recover, if he recover at all, reasonable and necessary counsel fees expended in obtaining a dissolution of the injunction; but he cannot recover counsel fees of his counsel in the injunction suit for any services other than for his services in obtaining a dissolution of the injunction.[26]

But he cannot recover as damages such reasonable and necessary fees of his counsel unless he has paid such fees.[27]

An action on such undertaking cannot be maintained until after it is finally determined in the action in which the injunction was granted, that the plaintiff in that action was not entitled thereto.[28]

24. Code of Civil Procedure, Sec. 533.
25. Leach v. Day, 27 Cal. 646; Richards v. Kirkpatrick, 53 Cal. 434.
26. Porter v. Hopkins, 63 Cal. 54, 55.
27. Wilson v. McEvay, 25 Cal. 169.
28. Clark v. Clayton, 61 Cal. 634.

RECEIVERS.

The appointment of a receiver in an action is another provisional remedy.

Courts of equity always had jurisdiction to appoint receivers when such appointment was in accordance with the usages of courts of equity; but the appointment of receivers, and their powers, and the powers which a court can confer on such receivers is largely prescribed and regulated by statute law.[29]

In California by statute law, a receiver may be appointed by the court in which an action is pending or by a judge thereof:

1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or firm, or in the proceeds thereof, is probable, and when it is shown that the property or fund is in danger of being lost, removed or materially injured.

2. In an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property, where it appears that the mortgaged property is in danger of being lost, removed or materially injured, or that the condition of the mortgage had not been performed and that the property is probably insufficient to discharge the mortgage debt.

3. After judgment, to carry the judgment into effect.

4. After judgment, to dispose of the property, according to the judgment, or to preserve it during the pendency of an appeal, or in proceedings in aid of execution, when an execution has been returned unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment.

5. In cases when a corporation has been dissolved or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights.

6. In all other cases where receivers have heretofore been appointed by the usages of courts of equity.[30]

29. Bateman v. Superior Court, 54 Cal. 285.
30. Code of Civil Procedure, Sec. 564.

Upon the dissolution of any corporation, the Superior court of the county in which the corporation carries on its business or has its principal place of business, on application of any creditor of the corporation, or of any stockholder or member thereof, may appoint one or more persons to be receivers or trustees of such corporation, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, and to pay the outstanding debts thereof, and to divide the moneys and other property, that shall remain over, among the stockholders or members.[31]

No party or attorney or person interested in an action, or who is related to any judge of the court by consanguinity or affinity within the third degree, can be appointed receiver therein, without the written consent of the parties filed with clerk.[32]

If a receiver be appointed upon an ex parte application the court before making the order may require from the applicant an undertaking with sufficient sureties in an amount to be fixed by the court, to the effect that the applicant will pay to the defendant all damages he may sustain by reason of the appointment of such receiver and the entry by him upon his duties, in case the applicant shall have procured such appointment wrongfully, maliciously, or without sufficient cause; and the court may in its discretion at any time after such appointment, require an additional undertaking.[33]

Before entering upon his duties the receiver must be sworn to perform them faithfully, and with one or more sureties, approved by the court or judge, execute an undertaking to such person and in such sum as the court or judge may direct, to the effect that he will faithfully discharge the duties of a receiver in the action and obey the orders of the court therein.[34]

The receiver has under the control of the court power to bring and defend actions in his own name as receiver, to take and keep possession of the property, to receive rents, collect debts, compound for and compromise the same, to make transfers, and

31. Code of Civil Procedure, Sec. 565.
32. Code of Civil Procedure, Sec. 566.
33. Code of Civil Procedure, Sec. 566.
34. Code of Civil Procedure, Sec. 567.

generally to do such acts respecting the property as the court may authorize.[35]

Funds in the hands of a receiver may be invested upon interest by order of the court, but no such order shall be made, except upon the consent of all the parties to the action.[36]

The possession of property by a receiver is the possession of the court for the benefit of all persons interested, and cannot be disturbed by any one without the permission of the court.[37]

The appointment of a receiver rests in the sound discretion of the court upon a view of all the facts.[38]

A court has no jurisdiction to appoint a receiver, as a provisional remedy, in an action at law brought to recover judgment on unsecured promissory notes.[39]

A receiver may be appointed pending an action brought by a trustee named in a mortgage or deed of trust, given by a corporation to secure the payment of its bonds after default in the payment of such bonds or in the payment of the interest due thereon.[40]

After judgment for plaintiff in an action for the recovery of the possession of real estate, a receiver of the rents and proceeds of the real estate may be appointed during the pendency of a motion for a new trial when the facts are such as would warrant such appointment.[41]

A receiver in an action has no right to take property, of which he is appointed such receiver, from the possession of a stranger to the action who claims to be a purchaser in good faith.[42]

A court has no jurisdiction to appoint a receiver in a quo warranto proceeding against a corporation, on judgment of forfeiture of its charter; and has no jurisdiction after judgment in such proceeding, to appoint a receiver pending an appeal to the Superior Court after a sufficient stay bond has been given on such appeal.[43]

35. Code of Civil Procedure, Sec. 568.
36. Code of Civil Procedure, Sec. 569.
37. Pacific Ry. Co. v. Wade, 91 Cal. 449.
38. Copper Hill M. Co. v. Spencer, 25 Cal. 11.
39. Smith v. Superior Court, 97 Cal. 348.
40. Sac. and Placerville R. R. Co. v. Superior Court, 55 Cal. 453.
41. Whitney v. Buckman, 26 Cal. 447.
42. Havemeyer v. Superior Court, 84 Cal. 327.
43. Same case.

A receiver appointed in an action to foreclose a mortgage and who works ores in lands of the mortgagor which are not included in the mortgage, does so without right and is a trespasser on such land and is liable as such trespasser to the mortgagor for the net proceeds of such ores; and the general creditors of such mortgagor may avail themselves of such liability, by proceedings supplemental to an execution against the property of such mortgagor.[44]

Property of a railway company in the lawful custody of a foreign receiver is, when brought within the state of California in the course of business, subject to an attachment, by a resident of California, who is a creditor of such railroad corporation.[45]

A person having a claim against a corporation whether such claim arose before or after the appointment of a receiver of the property of such corporation can apply by petition to the court appointing such receiver for relief, and on such petition that court, after due notice of the hearing of such petition, can hear and determine such claim.[46]

A receiver who takes possession of property under his due appointment by a court for that purpose, holds such property subject to the determination as to such property by the court making such appointment, and the action in which the appointment is made, so far as such property is affected thereby, is in the nature of an action in rem.

This seems to be within the reasons given by the United States Supreme Court in its decision in the case of Pennoyer v. Neff, 95 United States Reports 477.

DEPOSIT IN COURT.

There is another provisional remedy given by the statute in California called a deposit in court.

Under the laws of that state, where it is admitted by the pleading, or shown upon the examination of a party, that he has in his possession or under his control money or other things capable of delivery, which, being the subject of the litigation, is held by him as trustee for another party, or which belongs, or

44. Staples v. May, 87 Cal. 178.
45. Humphreys v. Hopkins, 81 Cal. 551.
46. Pacific Railway Co. v. Wade, 91 Cal. 449.

which is due, to another party, the court may order the same, upon motion to be deposited in court, or delivered to such party, upon such conditions as may be just, subject to the further direction of the court.

Such order may be enforced by the court.[47]

47. Code of Civil Procedure, Sec. 572 et seq.

CHAPTER XIII.

Of actions in particular cases, namely:

Actions for the foreclosure of mortgages.

Actions for nuisance, waste and wilful trespass, in certain cases on real property;

Actions for libel or slander.

Actions to determine conflicting claims to real property. and provisions relating to actions concerning real estate.

Actions for the partition of real property.

Actions for the usurpation of an office or franchise.

Actions against steamers, vessels and boats.

In addition to general provisions under the code system in relation to civil remedies, there are additional provisions under that system in the particular cases mentioned in this chapter.

In actions for the foreclosure of mortgages at common law, a mortgage was regarded as a conveyance of a conditional estate, which became absolute upon a breach of its condition; and it gave to the mortgagee, except as otherwise provided in the stipulations contained in or respecting the mortgage, a right to the immediate possession of the mortgaged property, upon which the mortgagee could enter peacefully or support ejectment.[1]

In California, and in most of the states, a mortgage does not convey the title to the mortgaged premises, but it only creates a lien thereon, as a security for the payment of the mortgage debt.[2]

Proceedings for the foreclosure of mortgages, in the sense in which the term is used in England, by which after default, the mortgagor is called upon to repay the loan by a specified day or be forever barred of his equity of redemption, are unknown to our law; and the payment of the mortgage debt before or

1. Fogarty v. Sawyer, 17 Cal. 589.
2. Carpentier v. Brenham, 40 Cal. 221; Code of Civil Procedure, Sec. 744.

after default, is, in California, an extinguishment of the mortgage.[3]

A subsequent mortgagee of the property is not a necessary, although he is a proper party to an action, by a prior mortgagee of the same property, for the foreclosure and sale of the property; if, however, the subsequent mortgagee be not made a party defendant in such action, he will have an equity of redemption in the mortgaged property which he can enforce by action against the person who has acquired a legal title thereto under a sale to enforce the judgment in the foreclosure suit.[4]

In California there can be but one action for the recovery of any debt or the enforcement of any right secured by mortgage upon real estate or personal property; in which action, the court may, by its judgment, direct a sale of the encumbered property, or so much thereof as may be necessary, and the application of the proceeds of the sale to the payment of the costs of the court, and the expenses of the sale, and the amount due the plaintiff; such sale may be made by the sheriff of the county in which the mortgaged premises are situated, or by a commissioner appointed by the court for that purpose; a person who holds an unrecorded conveyance or lien on the mortgaged property need not be made a party to such action, and the estate or interest of such person in the mortgaged property is bound by the judgment rendered therein.

The sheriff in his return of such sale, or the commissioner in his report of such sale, must specify the balance if any, remaining due after such sale, and the application of the proceeds thereof as directed by the judgment of the court, and a judgment thereupon must be docketed for such balance against the person or persons personally liable for the debt, and execution may issue thereon; if there be any surplus money remaining after the payment of the amount due on the mortgage lien or incumbrance with costs, and expenses of sale, the court may cause the same to be paid to the person entitled thereto, and in the meantime may direct it to be deposited in court.

If the debt, for which the mortgage, lien, or incumbrance is held, be not all due, so soon as sufficient of the property has

3. McMillan v. Richards, 9 Cal. 365.
4. Carpentier v. Brenham, 40 Cal. 221.

been sold to pay the amount due with costs, the sale must cease, and afterwards, and as often, as more becomes due, for principal or interest, the court may, on motion, order more to be sold.

But if the property cannot be sold in portions, without injury to the parties, the whole may be sold in the first instance, and the entire debt and costs paid, there being a rebate of interest when such rebate is proper.[5]

Adverse interests not subject to the mortgage for the foreclosure of which the action is brought, cannot be litigated in that action; but the question whether an interest in the mortgaged property was subject to the mortgage can be tried and determined in such action.[6]

If a note or bond, the payment of which is secured by a mortgage, be sued on in a common law action, and a judgment be rendered in favor of the plaintiff in the action, such action and judgment is a bar to proceedings for the foreclosure and sale of the mortgaged property for the payment of such note or bond.[7]

Such action of foreclosure and sale is the only action which can be maintained for the recovery of the mortgage debt, if an objection be made to another action by defendants, even if the security for the payment of such debt be originally valueless.[8]

If the mortgaged property has been sold by a receiver under an order of the court, pending an action for the foreclosure and sale of the mortgaged property, and there is a deficiency after such sale of such mortgaged property, in the proceeds of such sale to pay the mortgage debt and the costs and expenses in the action, the court in such foreclosure action, can render judgment for the amount of such deficiency.[9]

If there be no personal service of the summons in a foreclosure action on a defendant in that action, and he does not appear therein, a judgment for a deficiency against such defendant is invalid[10].

In an action to foreclose a mortgage, which provides that

5. Code of Civil Procedure, Sec. 726 et seq.
6. Tolman v. Smith, 85 Cal. 280.
7. Ould v. Stoddard, 54 Cal. 613.
8. Barbieri v. Ramelli, 84 Cal. 154.
9. Toby v. Oregon P. R. R. Co., 98 Cal. 490.
10. Pennoyer v. Neff, 97 U. S. 714.

the plaintiff shall be entitled to a judgment for his counsel fees in the action, or if the mortgage note so provides, the plaintiff is entitled to judgment for the reasonable attorney's fees of his attorney in the action not to exceed the amount thereof specified in the note or mortgage, if any amount be so specified.[11]

But if the plaintiff acts as his own attorney in a foreclosure suit, he is not entitled to anything for fees as an attorney in the suit. Patterson v. Donner, 48 Cal. 380.

The plaintiff in a foreclosure suit is not entitled to a greater amount for the fees of his attorney for services as such in the action than he has paid, or is liable for, to such attorney.[12]

As against the mortgagor of real estate, and as against those who claim from or under him subsequent to the commencement of the action if notice of the pendency of the action has been properly filed, a purchaser of lands sold under a decree in a foreclosure suit is entitled on receiving a deed on such purchase, to a writ of assistance, to place him in possession of the land so purchased, and conveyed to him.[13]

OF ACTIONS FOR NUISANCE, WASTE, AND WILFUL TRESPASS, AND FOR LIBEL OR SLANDER.

Actions may be maintained by any person whose property is injuriously affected, or whose enjoyment of his property is lessened by a private nuisance, for the abatement of such nuisance and for the damages which he has sustained thereby.[14]

If a guardian, tenant for life or years, joint tenant or tenant in common of real property commit waste thereon, any person aggrieved by such waste may maintain an action to recover the damages which he has sustained thereby against the persons who have committed the waste; and in such action, can recover judgment for three times the actual damage caused to him by such waste; and judgment for treble damages may be recovered by the owner of real estate against a person who without law or authority so to do cuts down or carries away or girdles, or otherwise injures trees, or timber on such real estate, or on a public highway or public grounds in front of such real estate.[15]

11. Campbell v. Freeman, 99 Cal. 546; 73 Cal. 569; 60 Cal. 220.
12. Bank of Woodland v. Treadwell, 55 Cal. 379, 380.
13. Montgomery v. Tutt, 11 Cal. 191.
14. Code of Civil Procedure, Sec. 731.
15. Code of Civil Procedure, Secs. 732, 733.

If a person recovers damages for a forcible or unlawful entry in or upon, or detention of, any building or cultivated real property, judgment may be entered in his favor for three times the amount at which the actual damages are assessed.[16]

In California, the plaintiff in an action to recover damages for a libel or for slander must file a written undertaking in the sum of $500 with at least two competent and sufficient sureties, specifying their occupations and residences, to the effect that if the action be dismissed or the defendant recover judgment, they will pay such costs and charges as may be awarded against the plaintiff by judgment or in the progress of the action, or on an appeal, not exceeding the sum specified in the undertaking; and if such undertaking be not filed, the action must be dismissed.[17]

The court, when a motion is made to dismiss such action, on the ground that such undertaking was not filed, may grant to the plaintiff a reasonable time within which to file such undertaking.[18]

OF ACTIONS TO QUIET TITLE TO REAL PROPERTY.

An action to quiet title to real estate, under the former practice, was an action in equity, and could be maintained only by the person who was in possession of the land at the commencement of the action or was in such possesion by his tenant.[19]

Since the adoption of the codes in California, actions to quiet title to real estate may be maintained in that state by a person who is not in possession of such real estate.[20]

The owner of real estate, the possession of which is withheld from him by another person, may maintain, in California, against that person an equitable action to quiet title, and if adjudged in the action to be such owner, he is entitled to a writ of assistance to place him in the possession of such real estate.[21]

In such action, so far as the same is an action of ejectment, the defendant is entitled to a trial by jury.[22]

16. Code of Civil Procedure, Sec. 735.
17. Statutes of 1871-2, p. 533.
18. Dixon v. Allen, 69 Cal. 527; 93 Cal. 425.
19. Rico v. Spence, 21 Cal. 504; Lyle v. Rollins, 25 Cal. 437.
20. Code of Civil Procedure, Sec. 738; People v. Center, 66 Cal. 551; Brusie v. Gates, 80 Cal. 462.
21. Landregan v. Peppin, 94 Cal. 465.
22. Donahue v. Meister, 88 Cal. 121; Gillispie v. Gouly, 120 Cal. 515.

If a defendant in an action to quiet title, disclaim in his answer, any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff cannot recover costs against such defendant.[23]

Under the provisions of section 738 of the Code of Civil Procedure a plaintiff may have his title to real estate quieted as against every description of claim whereby the plaintiff might be deprived of his property, or its title clouded, or its value depreciated.[24]

It was held before that code went into effect, that a court of equity would not interfere to cancel a deed upon the ground that it operates as a cloud on plaintiff's title to real estate, when the deed is void upon its face, or is the result of proceedings which are void on their face, or unless evidence was required on the part of the plaintiff, to show, as against his title to the real estate, that such deed was invalid.[25]

An action to determine an adverse title to real estate cannot be maintained against the holder of the legal title to such real estate.[26]

An action to quiet title differs materially from an action to declare and enforce a trust.[27]

An action to quiet title is an action in equity, and he that asks equity must do equity.[28]

A mortgagor of real estate cannot have his title quieted against a person to whom he has mortgaged such real estate without first paying or tendering the debt for the security of which the mortgage was given.[29]

Allegations in a complaint to quiet title to real estate which show that the plaintiff is the owner of such real estate (describing it) and that defendant claims an estate or interest therein adverse to the plaintiff, which claim is without right, and that

23. Code of Civil Procedure, Sec. 789.
24. Withers v. Jack, 79 Cal. 300.
25. Pixley v. Huggins, 15 Cal. 128; Cohen v. Sharp, 44 Cal. 30; and it is so held in New York—Crooke v. Andrews, 40 N. Y. 548.
26. Von Drachenfels v. Doolittle, 77 Cal. 296.
27. Bryan v. Tormey, 84 Cal. 126.
28. Benson v. Shotwell, 87 Cal. 49.
29. Brandt v. Thompson, 91 Cal. 458.

the defendant has no estate, right, title or interest in such estate, states a cause of action.[30]

It is not necessary that the plaintiff should allege that he is the owner in fee of the real estate, but the complaint will be sufficient if the plaintiff state therein the nature of his right and title to the real estate against which the defendant asserts an adverse claim.[31]

An action to quiet title is in the nature of an action in rem, and if personal service of the summons cannot be made on any defendant or defendants, such service may, on order of the court in which such action is pending or of a judge thereof, be made by publication.[32]

OTHER PROVISIONS RELATING TO ACTIONS CONCERNING REAL ESTATE.

In an action for the recovery of real property where the plaintiff shows a right to recover at the time the action was commenced, but it appears that his right has terminated during the pendency of the action, the verdict and judgment must be according to the fact, and the plaintiff may recover damages for withholding the property.[33]

When damages are claimed for withholding real property, upon which permanent improvements were made by a defendant, or those under whom he claims, holding under color of title adversely to the claim of the plaintiff, in good faith, the value of such improvements must be allowed as a set off against such damages.[34]

The court in which an action is pending for the recovery of real property or for damages for an injury thereto, or a judge thereof, may, on motion on notice by either party, for good cause shown, grant an order allowing to such party the right to enter on the property and make survey and measurement thereof, and of any tunnels, shafts or drifts therein, for the purpose of the action, even though entry for such purpose has to be made through other lands belonging to the parties to the action; such order must describe the property, and a copy thereof must be

30. Rough v. Simmons, 65 Cal. 227.
31. Stoddard v. Burge, 53 Cal. 395.
32. Code of Civil Procedure, Sec. 749.
33. Code of Civil Procedure, Sec. 740.
34. Code of Civil Procedure, Sec. 741.

served on the owner or occupant; and thereupon such party may enter on the property with necessary surveyor and assistants, and make such survey and measurements; but if any unnecessary injury be done to the property he is liable therefor.[35]

The court may by injunction, on good cause shown, restrain the party in possession from doing any act to the injury of real property during the foreclosure of a mortgage thereon; or, after a sale on execution before a conveyance.[36]

When real property has been sold on execution, the purchaser thereof, or any person who may have succeeded to his interest, may after his estate becomes absolute, recover damages for injury to the property by the tenant in possession after sale and before possession is delivered under the conveyance.[37]

An action for the recovery of real property against a person in possession cannot be prejudiced by any alienation made by such person, either before or after the commencement of the action.[38]

In an action respecting mining claims, proof must be admitted of the customs, usages or regulations established and in force at the bar or diggings embracing such claim; and such customs, usages or regulations, when not in conflict with the laws of this state, must govern the decision of the action.[39]

But such customs, usages and regulations, so far as they are in conflict with the laws of the United States, are invalid.[40]

ACTIONS FOR PARTITION OF REAL PROPERTY.

An action for the partition of real property is an action in equity. The common law remedy, the writ of partition, did not afford an adequate remedy, and has fallen into disuse.[41] The former remedy in equity did not authorize the court to order a sale of real property and make a division of the proceeds of such sale, if any one of the parties objected thereto.[42]

In California and in some of the other states, by statute such sale and division of the proceeds of the sale may be made.

35. Code of Civil Procedure, Secs. 742, 743.
36. Code of Civil Procedure, Sec. 745.
37. Code of Civil Procedure, Sec. 746.
38. Code of Civil Procedure, Sec. 747.
39. Code of Civil Procedure, Sec. 748.
40. Original Co. etc. v. Winthrop Mfg. Co., 60 Cal. 631.
41. 3 Pom. Eq. Jur., Sec. 1386.
42. 3 Pom. Eq. Jur., Sec. 1390.

In the partition of chattels, a sale of the chattel and a division of the proceeds of such sale among persons who were the owners as tenants in common of the chattels has long been a matter of equity jurisdiction.[43]

Partition of an entire tract of land cannot be by piecemeal.[44]

The court in its decree in an action for the partition of real property may allot to a cotenant that part of the common land upon which he has erected valuable improvements, and can allot to him any specific tract which he has undertaken to convey in severalty, if this can be done without any material injury to the rights and interests of the other cotenants.[45]

The judgment in an action for a partition ascertains, sets apart and allots to each of the parties of that action a specific portion of the land partitioned, to be owned by him in severalty, and after such allotment by judgment, the other parties to the action have no interest in the portion of the land so allotted, and the judgment of the court making such partition is final and conclusive on the parties to the action, unless reversed on an appeal.[46]

The pending of an action for the partition of real estate prevents the statute of limitations from running, as to any portion of the land in favor of a person who is a party to that action.[47]

A judgment in an action for the partition of real estate severs the unity of possession but does not vest in either of the cotenants a new or additional title.[48]

In California actions for the partition of real property are regulated by statute,[49] and no useful purpose would be subserved by a repetition of the provisions of such statute.

ACTIONS FOR THE USURPATION OF AN OFFICE OR FRANCHISE.

The writ of quo warranto was at common law a writ for the king, against him who claims or usurps any office, franchise or liberty, to enquire by what authority he supports his claim, in order to determine the right. It lies also in a case of non-user

43. 3 Pom. Eq. Jur., Sec. 1391; Baughman v. Reed, 75 Cal. 320.
44. Reinhart v. Lugo, 86 Cal. 400; Sutter v. San Francisco, 86 Cal. 116.
45. Emeric v. Alvarado, 90 Cal. 445; Code of Civil Procedure, Sec. 764.
46. McBrown v. Dalton, 70 Cal. 89.
47. Christy v. Spring Valley Water Co., 97 Cal. 21.
48. Wade v. Deray, 50 Cal. 380.
49. Code of Civil Procedure, Secs. 752-801.

or long neglect of a franchise, or misuser or abuse of it; being a writ commanding the defendant to show by what warrant he exercises such franchise.[50] That writ has fallen into disuse, and the modern method in England has been by a prosecution by information, in the nature of a writ of quo warranto, filed by the attorney-general in the court of the king's bench. Such proceeding by information is in the nature of a criminal prosecution, as well to punish the usurper by a fine for the usurpation of the franchise, as to oust him or seize it for the crown; but the fine imposed was merely nominal.[51]

Under the constitution of California of 1879 the Superior Courts and their judges have power to issue writs of quo warranto.

The power of the court under a writ of quo warranto is quite as broad as such power is under the statute of California, relating to an action for the usurpation of an office or franchise.[52]

Under the statutory proceeding in California when the action is brought on the information or application of a private party, the attorney-general may require from such private party an undertaking with sufficient sureties, conditioned that such party or sureties will pay any judgment for costs or damages recovered against the plaintiff, and all costs and expenses incurred in the prosecution of the action.[53]

It is the duty in California of the attorney-general to bring such action when he is directed by the governor so to do.[54]

Under the power given by the constitution of 1879 to Superior Courts to issue a writ of quo warranto, such writ, or a proceeding in the nature of such writ, may be issued to oust a person from the office of supervisor.[55]

In the proceedings by the state in the nature of a quo warranto to deprive a corporation de facto of its corporate charter, or to determine that the charter under which it claims its powers is not a legal charter, such de facto corporation is a proper and

50. 3 Bl. Com. 262.
51. 3 Bl. Com. 264.
52. People v. Dashaway Association, 84 Cal. 114.
53. Code of Civil Procedure, Sec. 810.
54. Code of Civil Procedure, Sec. 803.
55. People ex rel Smith v. Bingham, 82 Cal. 238.

necessary party.[56] If the relator claims the office as against the incumbent, the court may not only determine the right of the incumbent to the office, but that of the relator also, and may render judgment that the defendant deliver up to the relator the office.[57]

ACTIONS AGAINST STEAMERS, VESSELS AND BOATS.

The statutes of California have provided a remedy by an attachment suit against the owner of a vessel in which the vessel can be attached in the cases specified in the statute.[58] These statutory provisions are full and explicit.

Such actions are not to enforce a maritime lien which can be enforced only in a court of admiralty jurisdiction. In an action to enforce such maritime lien the vessel is the defendant, and the action is one in rem.

The action brought under the provisions of this statute is an action against the owner of the vessel, and it is not an action in rem except so far as the vessel is taken possession of, and held under and by virtue of the writ of attachment issued in the action.

In case a person has a maritime lien against the vessel and seeks to enforce such lien in a court of admiralty jurisdiction in an action against the vessel, such vessel can be taken possession of under proceeding in such action notwithstanding the vessel had previously been taken possession of under proceedings in such attachment suit.

56. People v. Gunn, 85 Cal. 244; People v. Montecito Water Co., 97 Cal. 276.
57. People ex rel Dickenson v. Banvard, 27 Cal. 470.
58. Code of Civil Procedure, Secs. 813, 827.

CHAPTER XIV.

OF ACTIONS TO ENFORCE ASSESSMENTS IN MUNICIPALITIES AND OF ACTIONS TO ENFORCE ASSESSMENTS FOR RECLAMATION PURPOSES.

An assessment on lands in municipalities made for the purpose of improving streets and for constructing sewers therein is a municipal tax,[1] but such assessment is not taxation within the intent and meaning of the 13th section of article XI of the former constitution of California.[2]

The power of a municipality to levy an assessment to defray the expenses of public improvements is given by the state legislature,[3] although the state legislature cannot itself by a direct act exercise the power of levying such assessment.[4] The state legislature cannot make valid an assessment for such purpose which was void;[5] the assessments must be levied with uniformity and equality by some standard which will approximate equality and uniformity such as an assessment in proportion to the number of front feet in a lot in a municipality which fronts on the improvement.[6]

In actions to recover such assessments strict compliance with the provisions of law authorizing them must be shown.[7]

Where a lot within the district liable to be assessed is omitted from the assessment, the whole assessment is void;[8] unless the lot which was not assessed belonged to the United States, or to the state, or to the municipality.[9]

1. Himmelmann v. Spanagel, 39 Cal. 389.
2. Chambers v. Satterlee, 40 Cal. 497.
3. Thompson v. Ruggles, 69 Cal. 465, 472.
4. Schumacher v. Toberman, 56 Cal. 508, 511; California Constitution, Art. XI, Sec. 12.
5. People v. Lynch, 51 Cal. 15.
6. Whiting v. Quackenbush, 54 Cal. 306.
7. Haskell v. Bartlett, 34 Cal. 281; Shipman v. Forbes, 97 Cal. 578; Howes v. Reis, 40 Cal. 255; Himmelman v. Danos, 35 Cal. 441; Brack v. Luning, 89 Cal. 316; Smith v. Cofran, 34 Cal. 310.
8. Diggins v. Brown, 76 Cal. 318.
9. Doyle v. Austin, 47 Cal. 353.

An assessment made on a lot not chargeable with such assessment is void.[10]

The owner of property is not required to appeal from an act which is void.[11]

It was held in McDonald v. Conniff, 99 Cal. 386, that the remedy of the party who was aggrieved by a street assessment in San Francisco was by an appeal to the board of supervisors of that municipality. If, however, an assessment for street work be illegal by reason of any defect, error, informality, omission or irregularity in the assessment, or in the recording, or in the return thereof, a new assessment may be made as provided by statute:[12] but a new assessment cannot be made if there was no valid contract for the work.[13]

The general law passed March 18th, 1885, commonly called the Vrooman act (statutes of 1885, p. 147, and the amendments thereto, statutes of 1889, p. 157, and 1891, p. 196), provide, before the issuance of the assessment roll, for a remonstrance to the city council by all persons owning lots liable to be assessed for street improvements, and after the first publication of the resolution of intention to do the work, who may feel aggrieved, or who have any objections to any of the subsequent proceedings of the city council in relation to the performance of the work mentioned in the notice of intention, and the city council must pass on this remonstrance, and its decision thereon is final and conclusive.[14]

This remonstrance was intended to apply to acts and proceedings which the city council had power to correct.[15]

Under this Vrooman act within thirty days after the date of the warrant attached to the assessment, either the contractor or his assigns, or any other person interested in the work, may appeal to the city council, and the determination and decision of the city council on such appeal is final and conclusive as to all errors, informalities and irregularities which the city council might have remedied; notice of the hearing of such appeal must

10. Parker v. Reay, 76 Cal. 103.
11. Dougherty v. Hitchcock, 35 Cal. 512.
12. Statutes 1891, p. 205, Sec. 9.
13. Manning v. Den, 90 Cal. 614.
14. Statutes of 1891, p. 197.
15. Capron v. Hitchcock, 98 Cal. 427.

be given by publication for five days.[16] Neither such appeal, nor the pendency thereof, nor the action of the city council thereon, extends the time for doing the work.[17] Special acts amending the charter of San Francisco (statutes of 1862, p. 391; statutes of 1871-2, p. 804) provide for an appeal in street assessment cases, and they further provide that the decision and determination of the board of supervisors on such appeal shall be final and conclusive.[18]

The Vrooman act provides that in all cases the contract authorized to be made by the superintendent with the contractor, as conditions to be performed by the contractor, must provide that the materials for the work shall comply with the specifications, and be to the satisfaction of the superintendent;[19] while in said acts amending the charter of San Francisco the provisions as to the conditions of such contract are that the materials used shall be such as are required by the superintendent, and the words that such materials for the work shall comply with the specifications are not required to be included in the contract.[20]

Under such provisions of the amended charter of San Francisco contained in said act of 1862, it was held in Emery v. Bradford, 29 Cal. 75, that since the legislature had provided that the conditions of the contract for street work should be that the work should be done under the direction and to the satisfaction of the superintendent and the materials used shall be such as are required by the superintendent, a compliance by the contractor with such conditions was a fulfillment of the terms of the contract. Had the legislature provided, as the legislature did in the Vrooman act, that there should be in such contract the further condition that the materials used for the work shall comply with the specifications, the Supreme Court could not have held that the performance of the work under the direction and to the satisfaction of the superintendent, and that the materials used were such as were required by the superintendent, were a compliance by the contractor with the conditions of the contract, since it is a rule as old as the common law of England, that a

16. Statutes of 1885, p. 156, Sec. 11.
17. Heft v. Payne, 97 Cal. 108.
18. Statutes of 1871-2, p. 815, Sec. 12.
19. Statutes of 1885, p. 151, Sec. 6.
20. Statutes of 1862, p. 394, Sec. 7; Statutes of 1871-2, p. 809, Sec. 7.

person cannot recover on a contract unless he complies with the conditions precedent to be performed by him which are contained in such contract.[21]

The Supreme Court has also decided in street contract cases arising under said amendments to the charter of San Francisco, that if the board of supervisors of that municipality had jurisdiction to order street work done, and the contract made and the proceedings had were such as were required by the provisions of said acts amending the charter of San Francisco, the only remedy which the property owner had was by an appeal to the board of supervisors, for the reason that the legislature had declared the decision and determination of that board on such appeal was final and conclusive. But the Vrooman act provides that the decision and determination of a city council on such an appeal shall be conclusive as to all errors, informalities and irregularities which the city council might have remedied and avoided. *Expressio unius exclusio est alterius* is a general rule in respect to the interpretation of statutes.

A failure to comply with conditions precedent in respect to materials to be used for street work is a matter of substance and not a mere error, informality or irregularity.

By the statute of 1885, page 157, section 12, an action must be brought to enforce the lien of an assessment; such action is an action in equity, and of such action the Superior Court of the county where the land on which the lien is claimed is situated has jurisdiction under the constitution of that state, constitution article 6, section 5, and nothing essential to that jurisdiction, if it has been conferred, can be taken away by the legislature so long as such jurisdiction exists. The enforcement of the lien, as the law now is, depends on the fact that the contractor has complied on his part with the conditions of the contract under which a lien is claimed.

The owner of property abutting on a street is not a party to a contract for the improvement of such street, when such contract is entered into,[22] and he is only brought into relation to the

21. Stephens on Pleadings 334.
22. Dyer v. Barston, 50 Cal. 652.

proceedings which resulted in such contract, when the assessment for the paying of the work done under such contract is made.[23]

The contract is valid if regularly executed by an official of a municipality under proceedings duly had, and the legislature may provide for the making by such official of the contract for the work, giving to the property owner or any one interested who is aggrieved, a right of appeal from such act of the official, and for the making the determination of the city council, or of the board of supervisors on such appeal, conclusive; yet when the legislature makes such determination conclusive only as to the errors, irregularities and informalities which the city council or the board could have remedied, it seems that in an action to enforce the lien of the assessment, such property owner would have the right to say that the contractor cannot enforce the claimed lien, because he has not performed on his part the conditions of the contract on the performance of which the right to have the claimed lien enforced is based.

An action to enforce an assessment on lands in a swamp land district to defray expenses for the reclamation of lands in such district, may be brought in a Superior Court of the county in which the lands are situated. A swamp land district is a public corporation.[24]

The validity of the organization of a swamp land district, acting as such, cannot be collaterally attacked.[25]

The validity of a de facto corporation for the reclamation of lands can only be attacked by direct proceedings for that purpose instituted on behalf of the people.[26]

Unless the swamp land district was organized under the provisions of the Political Code, and if the act under which it was organized, contained provisions for the levying and collecting of assessments for reclamation purposes, the provisions of that code relative to such assessments have no application,[27] but the act of March 10, 1885, (statutes of 1885, p. 77), made the

23. Dyer v. Barston, 50 Cal. 652.
24. Dean v. Davis, 51 Cal. 407; Case of Madera Irrigation District, 92 Cal. 297, 311.
25. Swamp Land District v. Silver, 98 Cal. 53; Hoke v. Perdue, 62 Cal. 545; Reclamation District v. Turner, 104 Cal. 334.
26. Dean v. Davis, 51 Cal. 407.
27. Reclamation District No. 3 v. Goldman, 61 Cal. 205.

provisions of the Political Code relative to reclamation districts for reclamation purposes, applicable to all reclamation districts organized before the codes went into effect, except that the provisions of said act were not to effect any proceedings commenced when that act went into effect, nor the indebtedness of districts theretofore incurred.

The enforcement of an assessment of land for reclamation purposes must be by an action in which the owner of the land can set out in his answer facts which would establish the invalidity of the assessment against his land.[28]

Absolute equality in imposing such assessments may not be reached. If no direct or invidious discrimination in favor of certain persons to the prejudice of others be made by the commissioners, it is not a valid objection to the mode pursued in making their assessment that to some extent irregularities may arise.[29]

Under the provisions of the swamp land act of 1868 the commissioners appointed to assess the land must jointly view and assess the land,[30] but under the provisions of section 3456 of the Political Code the commissioners need not act jointly in viewing the lands within the district.[31]

An action to enforce the assessment is properly brought by the swamp land district as the plaintiff.[32]

The commissioners appointed to make the assessment should assess upon the lands within the district, a charge proportionate to the whole expense and to the benefits which will result from the works of reclamation.[33]

Several tracts of land assessed separately to the same owner may be included in one action brought to enforce such assessment.[34]

The assessment made must cover all of the land in the swamp land district.[35]

28. Reclamation District v. Evans, 61 Cal. 104; Reclamation District v. Phelps, 108 Cal. 306.
29. Hagar v. Reclamation District, 111 U. S. 705.
30. Reclamation District v. Parvin, 67 Cal. 501; People v. Coghill, 47 Cal. 361.
31. Swamp Land District v. Gwynn, 70 Cal. 566.
32. Reclamation District v. Parvin, 67 Cal. 501.
33. Political Code, Sec. 3456.
34. District 110 v. Fisk, 60 Cal. 403; People v. Hagar, 52 Cal. 171;
35. Political Code, Sec. 3456; Reclamation District v. Huber, 57 Cal. 41.

Section 3459 of the Political Code provides that if the original assessment is insufficient to provide for the complete reclamation of the lands of a district, the board of supervisors of the county by which the district was formed on the presentation to the board by the trustees of the district of a statement of the work done or to be done and its estimated cost, can make an order directing the commissioners who made the original assessment, or other commissioners named by the board to assess the amount of such estimated cost as a charge upon the lands within the district.

An assessment for the reclamation of lands in a swamp land district is a liability created by statute, and an action to enforce it must be commenced within three years after the cause of action thereon accrued.[37]

In the absence of evidence to the contrary it will be presumed that the commissioners in viewing the land and making the assessment conformed to the requirements of section 3456 of the Political Code; and in an action to enforce the payment of a swamp land assessment, the record as entered in the minute book of the board of supervisors of the order of the board appointing commissioners to view the land and make the assessment is prima facie evidence of the facts stated therein, and a clerical error in this record may be altered so as to show the order actually passed by the board.[38]

The commissioners appointed to make the assessment should be disinterested persons.[39]

A swamp land assessment to a party named and to unknown owners is void.[40]

A swamp land assessment roll properly made out and certified to by the commissioners is probably prima facie evidence of the facts therein stated.[41]

An act which authorizes assessments on land without giving to the owner of the land an opportunity in an action or other-

37. People v. Halbert, 71 Cal. 72.
38. Swamp Land District v. Wilcox, 75 Cal. 443.
39. Political Code, Sec. 3456.
40. Gwynn v. Dierssen, 101 Cal. 564.
41. Swamp Land District v. Gwynn, 70 Cal. 566.

wise for a hearing in respect to such assessment, is unconstitutional.[42]

Whenever the jurisdiction of a tribunal, not a court of record, depends on facts which the tribunal is required to ascertain and settle by its decision, such decision, if the tribunal has jurisdiction of the parties, is conclusive against a collateral attack,[43] but such decision is not conclusive against a direct attack, whether such attack be by writ of review or otherwise.[44]

42. Hutson v. Protection District, 79 Cal. 90.
43. People v. Hagar, 52 Cal. 171.
44. In re Madera Irrigation District 92 Cal. 331 et seq.

CHAPTER XV.

OF PREPARATIONS FOR THE TRIAL OF AN ACTION.

When the issues of fact are joined in an action, the attorneys should make preparations for the trial of the action.

They should carefully determine what issues of fact are raised by the pleadings, and what evidence is applicable to such issues.

If there are documents which an attorney believes to be essential as evidence for his side of the case, and which are in the possession or under the control of the adverse party, he should demand an inspection of such documents and procure copies thereof.

If he deem the testimony of the adverse party to be material for his side of the case, he should take steps to have taken before trial the deposition of such adverse party.

If he knows of any witness who cannot be compelled by a subpoena to attend as a witness on the trial of the action, he should have taken the deposition of such witness to be used on such trial.

He should ascertain before the trial of the action if it be possible so to do, what the testimony of each witness whom he proposes to introduce as a witness on the trial of the action will be.

He should take prompt steps to have subpoenaed for the trial of the action all persons whose attendance as witnesses is material at such trial when such attendance can be enforced by subpoena.

He should give reasonable notice to the adverse party to produce at the trial of the action, documents and papers which are in the possession or control of the adverse party, and which he deems essential as evidence on his side of the case.

And he should acquaint himself with all the rules of evidence which are applicable to the introduction of evidence on the trial of the action.

If an attorney for the defendant, and he is of the opinion that the plaintiff in the action will be entitled to judgment for some amount or for some property or otherwise in the action, he should at least ten days before the action serve upon the plaintiff an offer in writing signed by the defendant, to allow judgment to be taken against him for the sum or property, or to the effect in such offer specified.

In such case if the plaintiff does not accept the offer and fail to obtain a more favorable judgment, he cannot recover costs, but must pay the defendant's costs from the time of the offer.[1]

If an attorney for either party cannot obtain from the other party to the action an inspection and copy of entries of accounts in any book, or of any document or paper in the possession of such other party or under his control containing evidence relating to the merits of the action or the defense therein, such attorney should, on affidavit showing that such book of accounts, document, or paper contains evidence relating to the merits of the action, or the defense therein, and on a written notice to the opposite party of his intention so to do, apply to the court in which the action is pending, or a judge thereof, for an order that such other party within a time to be specified in such order give to him an inspection and copy, or permission to take a copy of such entries, document or paper; and if compliance with such order be refused, the court may exclude the entries of accounts, or the document or paper from being given in evidence, or if wanted as evidence by the party applying may direct them to be presumed to be such as the party applying for the order alleges them to be.[2]

1. Code of Civil Procedure, Sec. 997.
2. Code of Civil Procedure, Sec. 1000.

CHAPTER XVI.

OF EVIDENCE.

Judicial evidence is the means sanctioned by law of ascertaining in a judicial proceeding the truth respecting a question of fact.[1]

Proof is the establishment of a fact by evidence.[2]

Courts take judicial notice of certain facts, and such facts need not be alleged in the pleadings; and evidence need not be introduced on the trial of the action to establish such facts.[3]

Such facts are:

1. The true significance of all English words and phrases, and of all legal expressions.

2. Whatever is established by law.

3. Public and private official acts of the legislative, executive and judicial departments of the state and of the United States.

4. The seals of all the courts of this state and of the United States.

5. The accession to office, and the official signatures and seals of office of the principal officers of government in the legislative, executive and judicial departments of this state and of the United States.

6. The existence, title, national flag and seal of every state or sovereign recognized by the executive power of the United States.

7. The seals of courts of admiralty and maritime jurisdiction, and of notaries public.

The laws of nature, the measure of time, and the geographi-

1. Code of Civil Procedure, Sec. 1823.
2. Code of Civil Procedure, Sec. 1824.
3. Stephens on Pleadings 346; 1 Greenleaf Ev., Chapter II.

cal divisions and political history of the world;[4] and whatever should be generally known within the limits of their jurisdiction.[5]

Section 459 of the Code of Civil Procedure provides for pleading a private statute, but since a private statute is an official act of the legislative and executive departments of the state government, the courts should take judicial notice of a private statute.[6]

A private statute of this state is one which concerns only certain designated individuals and affects only their private rights. All other statutes are public, including statutes creating or affecting corporations.[7]

4. Code of Civil Procedure, Sec. 1875.
5. 1 Greenleaf on Evidence, Sec. 6.
6. People v. Hagar, 52 Cal. 172.
7. Code of Civil Procedure, Sec. 1898.

CHAPTER XVII.

OF THE CLASSIFICATION OF EVIDENCE.

Evidence is:

Written or parol;

Primary or secondary;

Conclusive or disputable;

Cumulative or corroborative;

Indispensable, partial, prima facie, satisfactory, direct or circumstantial;

Written evidence is of two kinds, namely, public writings and private writings.

Primary evidence is that kind of evidence which under every possible circumstance affords the greatest certainty of the fact in question.[1]

A written instrument is primary of the best evidence of its contents.

Secondary evidence is evidence of the contents of a written instrument introduced instead of the original written instrument.

Such secondary evidence is not admissible except as provided by law in cases in which the original written instrument cannot be produced at the trial.

I know of no case in which it has been held that any evidence is secondary other than evidence introduced in place of such original written instrument.

Some evidence may be less satisfactory and convincing than other evidence of the existence of a fact, but this of itself does not make the less satisfactory evidence inadmissible.

Before a written instrument or secondary evidence of its contents can be admitted in evidence, the genuineness and due

1. 1 Greenleaf on Evidence, Sec. 84.

execution of the original written instrument must be proven or admitted.

Prima facie evidence is that which suffices for the proof of a particular fact until contradicted or overcome by other evidence.[2]

Indispensable evidence is that without which a particular fact cannot be proved.[3]

Conclusive evidence is that which the law does not permit to be contradicted.[4]

Disputable evidence is that which the law permits to be contradicted by other evidence

Cumulative evidence is additional evidence of the same character to the same point.

Corroborative evidence is additional evidence of a different character to the same point.[5]

Satisfactory evidence is that which ordinarily convinces to a moral certainty an unprejudiced mind.[6]

Direct evidence is that by which the fact to be proven is directly testified to by those who speak from their own actual and personal knowledge of its existence.

Circumstantial evidence is direct evidence of the existence of facts from which the fact to be proven may be inferred.[7]

There must be direct evidence in both direct and circumstantial evidence, but in direct evidence the existence of the fact to be proven must be directly testified to by the witness; while in circumstantial evidence the existence of a fact is to be inferred from other facts, the existence of which is directly testified to by a witness or by witnesses.

No inference which is based on another inference will be admitted as circumstantial evidence.[8]

In the case of direct evidence belief of the truth of the fact to be proven is based on our faith in human veracity.

In a case of circumstantial evidence belief in the truth of a

2. Code of Civil Procedure, Sec. 1833.
3. Code of Civil Procedure, Sec. 1836.
4. Code of Civil Procedure, Sec. 1837.
5. Code of Civil Procedure, Secs. 1838, 1839.
6. Code of Civil Procedure, Sec. 1835.
7. Greenleaf on Evidence, Sec. 13.
8. 1 Greenleaf Ev., Sec. 13 n. 1.

fact to be proven is based on the same ground with the additional ground of the experienced connection between the collateral facts directly proven and the fact to be proven.[9]

It is provided in the Code of Civil Procedure of California that when an action is brought upon a written instrument and the complaint contains a copy of such instrument or a copy is annexed thereto, the genuineness and due execution of such instrument are deemed admitted, unless the answer denying the same be verified; and that when the defense to an action is founded on a written instrument, and a copy thereof is contained in the answer or annexed thereto, the genuineness and due execution of such instrument are deemed admitted unless the plaintiff within ten days after receiving a copy of such answer file with the clerk an affidavit denying the same, and serve a copy thereof on the defendant; in neither of those cases, however, will the execution of such instrument be deemed admitted by failure to deny the same under oath if the party desiring to controvert the same is, upon his written demand for an inspection of the original served by copy upon the adverse party or his attorney and filed with the papers in the case refused such inspection.[10]

9. 1 Greenleaf Ev., Sec. 13.
10. Code of Civil Procedure, Secs. 447, 448, 449.

CHAPTER XVIII.

OF DISPUTABLE PRESUMPTIONS OF FACT.

Section 1963 of the California Code of Civil Procedure mentions a number of disputable presumptions of fact which are satisfactory if uncontradicted, but which may be controverted by other evidence.

Among the most important of these are the following, namely:

That the things which a person possesses are owned by him;

That a person is the owner of property from exercising acts of ownership over it, or from common reputation of such ownership;

That a person acting in a public office was regularly appointed to it;

That official duty has been regularly performed;

That a court or judge acting as such, whether in this state or any other state or country, was acting in the lawful exercise of his jurisdiction;

That an indorsement of a negotiable instrument was made at the time and place of making the instrument;

That a writing was truly dated;

That a letter duly directed and mailed was received in the regular course of mail;

That persons acting as copartners have entered into a contract of copartnership;

That a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage;

That a printed or published book purporting to be printed or published by public authority was so printed and published;

That there was a good and sufficient consideration for a written contract.

Section 1963 of the Code of Civil Procedure of the state of California is referred to for information as to other disputable presumptions of fact in that state.

CHAPTER XIX.

OF EVIDENCE OF THE CONTENTS OF WRITINGS AND WHEN BY STATUTE WRITINGS ARE MADE EVIDENCE.

The contents of a written instrument can only be proven by the production of the instrument itself, except in the following cases, namely:

1. Unless it be first proven that such instrument has been lost or destroyed;

2. Or unless the original is in the possession of the party against whom the evidence is offered and he fails to produce it after reasonable notice;

3. Or when the original is a record or other document in the custody of a public officer;

4. Or when the original has been recorded and a certified copy of the record is made evidence by statute.

In the first two of the above named cases the contents of such written instrument may be proven by either a copy shown to be a true copy, or by oral evidence.

In the last two of such cases the contents of the written instrument or of its record must be proven by a copy of the original or of the record, proven to be such copy.

If the original, however, consists of numerous accounts or other documents which cannot be examined in court without great loss of time, oral evidence is admissible, but only for the purpose of showing the general result of the whole.[1]

If the essential fact to be proven is not the contents of a written instrument, but is an independent fact to which the writing is merely collateral or an incident, the writing need not be produced in evidence, but the fact may be proven by parol, as the payment of money, on the settlement of an account, although

1. Code of Civil Procedure, Sec. 1855; Greenleaf Ev., Sec. 98

a receipt was given.[2] A number of cases of that kind are given in sections 202 and 203 of 1 Jones on Evidence.

When a telegram is given to a telegraph company for transmission and is properly addressed, it is to be presumed that it was received by the person to whom it was so properly addressed.[3]

Secondary evidence is not admissible to prove the contents of a telegram unless the original cannot be produced.[4]

In that case it is held that the message taken and delivered at the telegraph office to be sent was the original.

If parties agree to deal by telegraph then the telegram delivered to the person to whom it was addressed is the best evidence of its contents, and the person sending the message, it having been first proven that he sent the telegram, was bound by the contents as so delivered, and that when a contract is to be made between them by telegram, a delivery of a telegram acceptance of an offer, into the office of the telegraph company for transmission to the sender of the offer completed the contract, unless notice of the withdrawal of the offer had been received by the sender of such acceptance of the offer before such delivery of the acceptance at the telegraph office.[5]

When a person to whom a telegram is sent takes the risk of its transmission, the message deposited to be sent is the original message, and the best evidence of its contents, but when the person sending the message takes the initiative the message delivered is the original, and is the best evidence of its contents.[6]

The person sending a telegraph message to be acted on by another is bound by the contents of the message as delivered.[7]

In case an instrument is executed in duplicate, triplicate, etc., each is an original instrument.

By the statutes of the state of California a certificate of purchase or of location of land in that state, issued and made in pursuance of any law of the United States, or of that state, is declared to be primary evidence that the holder or assignee of

2. 1 Jones on Ev., Sec. 202.
3. Oregon Steamship Co. v. Otis, 100 N. Y. 446.
4. Smith v. Easton, 39 Am. Rep. 255.
5. Trevor v. Ward, 93 Am. Dec. 511, and cases cited in notes.
6. 1 Greenleaf Ev., Sec. 88 n. a.
7. Notes to Trevor v. Ward, 93 Am. Dec. 511.

such certificate is the owner of the land described therein; but such evidence may be overcome by proof that at the time of the location, or the time of the filing a pre-emption claim on which the certificate may have been issued, the land was in the adverse possession of the adverse party or those under whom he claims, or that the adverse party is holding the lands for mining purposes.[8]

And it is further provided by statute law in California that every instrument conveying or affecting real property, acknowledged or proved and certified as provided in the Civil Code of that state, may, together with the certificate of acknowledgment or proof, be read in evidence in an action without further proof; also that the original record of such conveyance or instrument thus acknowledged or proved, or a certified copy of the record of such conveyance or instrument thus acknowledged or proved may be used in evidence, with the like effect as the original instrument, without further proof.[9]

By statute law of the same state the following is declared to be prima facie evidence of facts, namely:

That an entry made by a public officer or board of officers in the course of official duty, or by another person in the performance of a duty specially enjoined by law, is prima facie evidence of the facts stated in such entry;[10]

That a private writing, except last wills and testaments, may be acknowledged or proved and certified in the manner provided for the acknowledgment or proof of conveyances of real property, and the certificate of such acknowledgment or proof is prima facie evidence of the execution of the writing in the same manner as if it were a conveyance of real estate;[11]

That the order of a Superior Court made in the exercise of its probate jurisdiction under the provisions of section 1460 of the Code of Civil Procedure for the disclosure of property shall, as against the person so ordered to disclose property, be prima facie evidence in favor of the executor or administrator of the estate in which such order is made, of the right of such executor

8. Code of Civil Procedure, Sec. 1925.
9. Code of Civil Procedure, Sec. 1951.
10. Code of Civil Procedure, Sec. 1926.
11. Code of Civil Procedure, Sec. 1948.

or administrator to such property, in any action for the recovery thereof;[12]

That a certified copy of a conveyance of land made by an executor or administrator must be recorded in the office of the county recorder of the county in which the land is situated, and is prima facie evidence of the correctness of the proceedings under which such conveyance was made, and of the authority of the executor or administrator to make such conveyance.[13]

The publication in a newspaper of notice therein of the sale of stock of a corporation for delinquency in the payment of assessments thereon, may be proven by the affidavit of the printer, foreman or principal clerk of such newspaper; and the affidavit of the secretary of the corporation or of the auctioneer making the sale, is prima facie evidence of the time and place of sale, of the quantity and particular description of the stock sold, and to whom and for what price, and of the fact of the purchase money being paid: such affidavits must be filed in the office of the corporation, and copies of the same, certified by the secretary of the corporation, are prima facie evidence of the facts therein stated.

Certificates signed by the secretary of a private corporation and under the seal of the corporation are prima facie evidence of the contents thereof.[14]

Copies of entries of a county clerk as directed to be made by the provisions of the Civil Code relating to partnerships, when certified by him, and affidavits of publication directed to be published by such provisions, made by the printer, publisher or chief clerk of a newspaper, are presumptive evidence of the facts therein stated.[15]

The protest of a notary public under his hand and official seal, of a bill of exchange or promissory note stating the existence of the facts mentioned in section 795 of the Political Code is prima facie evidence of the facts stated therein.[16] A certificate of a notary public under his seal of his presentation of a claim against the estate of a deceased person is prima facie evidence

12. Code of Civil Procedure, Sec. 1460.
13. Code of Civil Procedure, Sec. 1601.
14. Civil Code, Sec. 348.
15. Civil Code, Sec. 2471.
16. Political Code, Sec. 795.

of the presentation of the claim to the executor or administrator, and of the date of such presentation.[17]

The books and records of regiments, battalions and companies of the national guard of California of the proceedings under which delinquents are fined, are prima facie evidence of the facts therein stated in an action to collect such fines.[18]

A certificate of the secretary of a fire department of records required to be kept by him by the provisions of section 3341 of the Political Code, of certificates of exemption, or active membership, and the dates thereof, and to whom issued in such fire department, is prima facie evidence of the facts therein stated.[19]

All surveys and maps of boundary lines of counties legally made and approved before July 6th, 1874, are prima facie evidence of the establishment of such lines, except so far as they are inconsistent with the provisions of the Political Code.[20]

The warrant, assessment, certificate and diagram with the affidavit of demand and non-payment in an action to recover a street assessment is prima facie evidence of the regularity and correctness of the assessment, and of the prior proceedings and acts of the superintendent of streets and city council upon which said warrant, assessment and diagram are based, and of the plaintiff's right to recover in the action.[21]

17. Code of Civil Procedure, Sec. 1496.
18. Political Code, Sec. 1935.
19. Political Code, Sec. 3341.
20. Political Code, Sec. 3973.
21. Statutes of 1889, p. 168.

CHAPTER XX.

OF INDISPENSABLE EVIDENCE.

The following are cases of indispensable evidence under the laws of the state of California, namely:

Perjury and treason must be proven by the testimony of more than one witness; treason by the testimony of two witnesses to the same overt act, and perjury by the testimony of two witnesses, or one witness and corroborating circumstances.[1]

The rule that to convict of perjury the testimony must be that of more than one witness applies only to the fact whether the matter alleged to have been sworn to was false.[2]

The will of a deceased person, unless it be a non-cupative will, can only be proven by the production of the will, unless such will be lost or destroyed, and by evidence that it was executed with such formalities as are required by law.[3]

An olographic will is proved, unless it be lost or destroyed, by the production of the will, and by evidence that it was entirely written, dated and signed by the testator himself.[4]

A non-cupative will need not be in writing, but to be valid the estate bequeathed thereby must not exceed the sum of one thousand dollars.

A non-cupative will must be proved by two witnesses who were present at the making thereof, one of whom must have been asked by the testator at the time to bear witness that such was his will, or to that effect; and it must be further proven that the testator at the time of making the will was in actual military service in the field, or doing duty on shipboard at sea, and in either case in actual contemplation, fear or peril of death; or it

1. Code of Civil Procedure, Sec. 1968.
2. Commonwealth v. Pollard, 12 Met. 227.
3. Code of Civil Procedure, Sec. 1969.
4. Civil Code, Sec. 1277.

must be proven that the testator was at the time in expectation of immediate death from an injury received the same day.[5]

No proof, however, can be received of a non-cupative will unless it is offered within six months after speaking the testamentary words, nor unless the words, or the substance thereof, were reduced to writing within thirty days after they were spoken.[6]

Every will other than a non-cupative will must be in writing, and every will other than an olographic will and a non-cupative will must be proven to have been executed and attested as follows:

1. It must be subscribed at the end thereof by the testator himself, or some person in his presence, and by his direction must subscribe his name thereto;

2. The subscription must be made in the presence of the attesting witnesses, or be acknowledged by the testator to them to have been made by him or by his authority;

3. The testator must at the time of subscribing or acknowledging the same, declare to the attesting witnesses that the instrument is his will;

4. There must be two attesting witnesses, each of whom must sign his name as a witness at the end of the will at the testator's request and in his presence.[7]

No will shall be proved as a lost or destroyed will unless its provisions are clearly and distinctly proved by at least two credible witnesses.[8]

If a will be contested, all the subscribing witnesses to the will, who are present in the county in which the contest is had, and who are of sound mind, must be produced and examined, and the death, absence, or insanity of any of them, must be satisfactorily shown to the court.[9]

The creating, granting, assigning, surrendering or declaring, otherwise than by operation of law, of an estate or interest in real estate, other than that of an estate for a term not exceeding one year, and any trust in real property, or power

5. Civil Code, Sec. 1289.
6. Civil Code, Sec. 1290.
7. Civil Code, Sec. 1276.
8. Code of Civil Procedure, Sec. 1339.
9. Code of Civil Procedure, Sec. 1315.

over or concerning it, or in any manner relating thereto, must be proven by a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing;[10] this rule, however, does not apply to the case of any trust arising or being extinguished by implication or operation of law, nor to abridge the power of a court to compel the specific performance of an agreement in case of a part performance thereof.[11]

Neither a sale of growing crops, nor a sale of standing trees sold in prospect of immediate separation from the land is a sale of an interest in land.[12]

No divorce can be granted upon the default of the defendant, or upon the uncorroborated statement, admission or testimony of the parties.[13]

The corroboration need not be to every fact and circumstance testified to by a party to an action for a divorce, but it is enough, if the testimony of facts and circumstances which are sufficient to support the action be corroborated.[14]

10. Code of Civil Procedure, Sec. 1971.
11. Code of Civil Procedure, Sec. 1872.
12. 1 Greenleaf on Ev., Sec. 271.
13. Civil Code, Sec. 130.
14. Cooper v. Cooper, 88 Cal. 45.

CHAPTER XXI.

OF INCOMPETENT EVIDENCE.

Parol evidence, unless when admissible as secondary evidence, is not competent evidence to prove the following agreements and promises, but such agreements and promises must be proven by written evidence or some written note or memorandum thereof, *subscribed* by the party charged or his agent.

1. An agreement that by its terms is not to be performed within a year from the making thereof;

2. A special promise to answer for the debt, default or miscarriage of another, except in the cases mentioned in section 2794 of the Civil Code; but such cases are not, in fact, cases of special promises to answer for the debt, default, or miscarriage of another, but they are cases in which the promise is an original obligation of the promiser.

3. An agreement in consideration of marriage, other than a mutual promise to marry.[1]

4. An agreement for the sale of goods, chattels or things in action, at a price not less than two hundred dollars is not admissible in evidence, unless such agreement or some note or memorandum thereof be in writing and subscribed by the party to be charged, or by his agent; or unless the buyer accept and receive part of such goods and chattels, or the evidence, or some of them, of such things in action, or pay, at the time, some part of the purchase money; when, however, a sale is made by auction, an entry by the auctioneer in his sale book, at the time of the sale, of the kind of property sold, the terms of sale, the price, and the names of the purchaser, and person on whose account the sale is made, is a sufficient memorandum.

5. An agreement for the leasing of real estate for a longer

1. Code of Civil Procedure, Sec. 1973.

period than one year, or for the sale of real property, or of an interest therein, is not competent evidence, unless such agreement be subscribed by the party sought to be charged, or by his agent, whose authority so to do must be in writing and subscribed by the party sought to be charged.[2]

The agreement or memorandum is only required to be subscribed by the party sought to be charged, and it need not be subscribed by both parties to the agreement.[3]

In England and some of the states, the agreement is only required to be *signed* by the party sought to be charged. In which case the signature may be in any part of such agreement.[4]

No evidence is admissible to charge a person upon a representation as to the credit of a third person, unless such representation or some memorandum thereof be in writing and either subscribed by, or in the handwriting of the party to be charged.[5]

No executor or administrator is to be charged upon any special promise to answer damages or to pay the debt of the testator, or intestate out of his own estate, unless the agreement is in writing and *signed* by such executor or administrator, or by some other person by him thereunto specially authorized.[6]

2. Code of Civil Procedure, Sec. 1973.
3. 1 Greenleaf Ev., Sec. 268.
4. 1 Greenleaf Ev., Sec. 268.
5. Code of Civil Procedure, Sec. 1974.
6. Code of Civil Procedure, Sec. 1612.

CHAPTER XXII.

OF CONCLUSIVE EVIDENCE.

In California no evidence is by law made conclusive unless so declared by the Code of Civil Procedure of that state.[1]

The following evidence is, by the Code of Civil Procedure of the State of California conclusive, namely:

1. A malicious and guilty intent, from the deliberate commission of an unlawful act, for the purpose of injuring another;

2. The truth of facts recited, from the recital thereof in a written instrument, between the parties thereto, or their successors in interest by a subsequent title; but this rule does not apply to the recital of a consideration;

3. Whenever a party has by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot in any litigation arising out of such declaration, act, or omission, be permitted to falsify it;

4. A tenant is not permitted to deny that the title of his landlord to leased property existed at the time of the commencement of the relation;

5. The issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate;

6. The judgment and order of a court, when declared by that code to be so, is conclusive; but such judgment or order must be alleged in the pleadings if there be an opportunity to do so. If there be no such opportunity, the judgment or order may be used as evidence.[2] A judgment or order of a court or judge of that state, or of the United States having jurisdiction to pronounce the judgment or make the order, when against a specific thing, or in respect to the probate of a will, or the

1 Code of Civil Procedure, Sec. 1978.
2. Code of Civil Procedure, Sec. 1962.

administration of the estate of a decedent, or in respect to the personal, political, or legal condition or relation of a particular person, is conclusive upon the title to the thing, the will, or administration, or the condition or relation of the person.[3]

In such cases, the judgment or order is, in an action in rem, or in a proceeding in the nature of an action in rem.[4]

A judgment or order of a court or judge of that state, or of the United States having jurisdiction to pronounce the judgment or make the order is in respect to the matter directly adjudged, conclusive between the parties to the action, and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing, under the same title, and in the same capacity, provided they had notice actual or constructive of the pendency of the action or proceeding.[5]

In California, the judgment in an action for the foreclosure of a mortgage is as conclusive against the person having a conveyance of the mortgaged property from or under the mortgagor, and against a person having a lien thereon, when such conveyance or lien does not appear of record in the proper office at the time of the commencement of the action, as it would have been if they were parties to the action.[6]

All persons who are represented by parties to an action and claim under them, or are in privity with them, are equally concluded by the judgment or order, as are the parties to the action.[7]

Parties to an action are deemed to be the same when those between whom the evidence is offered, were on opposite sides in the former case, and a judgment or other determination could, in that case, have been made between them alone, though other parties were joined with both or either.[8]

That only is deemed adjudged in a former judgment, which,

3. Code of Civil Procedure, Sec. 1908, Sub. 1.
4. Greenleaf Ev., Sec. 525.
5. Code of Civil Procedure, Sec. 1908, Sub. 2; Greenleaf Ev., Sec. 19, 522.
6. Code of Civil Procedure, Sec. 726.
7. 1 Greenleaf Ev., Sec. 523.
8. Code of Civil Procedure, Sec. 1910; Greenleaf Ev. Sec. 528.

upon its face, appears to have been so adjudged, or which was actually and necessarily included therein, or was necessary thereto.[9]

When authority is given to a court to adjudge as to the jurisdictional facts, such adjudication is conclusive, and may appear by recitals in the judgment, at least in respect to judgments of courts of record.[10]

Under the California code, when a person is surety for another person, and as such surety is a party to an action or proceeding, and the principal had notice of the action or proceeding, and an opportunity, at the surety's request, to join in the defense, such principal is bound, the same as the surety, from the time of such request to join in the defense.[11]

A judgment in rem rendered by a court having jurisdiction to render the same, is conclusive as to property, and the title thereto;[12] and as a general rule, a judgment as to the status of person is conclusive.[13]

Judgments, however, which are not conclusive as to *all* the parties, or as to all those who could have been parties to an action or proceeding, and who are directly affected by such judgment, is not conclusive as to any of them.[14]

In California the effect of a judgment or order of a court of a sister state, is the same in that state, as it is in such sister state, except that the authority of a guardian, or committee, or of an executor or administrator does not extend beyond the jurisdiction of the government under which he is invested with his authority;[15] and this is the general rule in the United States.[16]

In the following cases the judgments and orders of the court, or of a judge of a court, in California, having jurisdiction to render the judgment or make the order, is conclusive, namely:

9. Code of Civil Procedure, Sec. 1911; 1 Greenleaf. 528.
10. Kahn v. Kelly, 34 Cal. 391.
11. Code of Civil Procedure, Sec. 1912.
12. 1 Greenleaf Ev., 541; Code of Civil Procedure, Sec. 1914 and Sec. 1915, Sub. 1.
13. 1 Greenleaf Ev., Sec. 544.
14. 1 Greenleaf Ev., Sec. 524, Sec. 525.
15. Code of Civil Procedure, Sec. 1913.
16. 1 Greenleaf Ev., Sec. 544.

1. The settlement of the account and the allowance thereof, of an executor or administrator, by the court, or upon appeal, saving, however, to all persons laboring under any legal disability, the right to open and examine the account, or to proceed by action against the executor or administrator, either individually, or upon his bond, before final distribution of the estate of the decedent;[17]

2. The order or decree of the court distributing the estate of a decedent as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside or modified on appeal;[18]

3. The order of a court entered in the minutes of the court, that the required proof had been made and notice given, on a petition for letters of administration;[19]

4. That the probate of a will is conclusive unless contested within one year after such probate, saving to infants and persons of unsound mind the like period of one year after their respective disabilities are removed.[20]

The recitals in a public statute are conclusive evidence of the facts recited for the purpose of carrying it into effect, but no further; and the recitals in a private statute are conclusive evidence between the parties who claim under its provision, but no further.[21]

A judgment or order to be conclusive must be a final judgment, and in case of an appeal within the time and as provided by statute, the final judgment or order upon an appeal, is the final judgment.

17. Code of Civil Procedure, Sec. 1637.
18. Code of Civil Procedure, Sec. 1666.
19. Code of Civil Procedure, Sec. 1376.
20. Code of Civil Procedure, Sec. 1333.
21. Code of Civil Procedure, Sec. 1903.

CHAPTER XXIII.

OF EVIDENCE OF PUBLIC WRITINGS.

Public writings as defined in the Code of Civil Procedure of California, are:

1. The written acts or records of the acts, of the sovereign authority of official bodies and tribunals, and of public officers, legislative, judicial and executive;

2. Public records kept in that state of private writings as provided by law.[1]

A public writing is the best evidence of its contents, but since public writings are required to be kept at places fixed by law, and by officers whose duty it is so to keep them, such officers cannot be legally required to produce them, other than in the place where they are so required to be kept, except in some cases, when such production is by statute law authorized and directed.

The law has provided for the production of a copy of such public writings, duly authenticated as such copy, as a secondary evidence of the contents of the original writing.

In California, a record of a conveyance of real property or any record, a transcript of which is admissible in evidence, must not be removed from the office in which it is kept, except on the order of a court in cases where the inspection of the record is shown to be essential to the just determination of the cause or proceeding pending, or where the court is held in the same building with such office.[2]

Under the provisions of general laws of the United States, the acts of the legislature of any state or territory, or of any country subject to the jurisdiction of the United States, shall

1. Code of Civil Procedure, Sec. 1888.
2. Code of Civil Procedure, Sec. 1950.

be authenticated by having the seal of such state, territory, or country affixed thereto; and the records and the judicial proceedings of the courts of any state, territory, or of any such country, shall be proved or admitted in any other court, within the United States, by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form; and such records and judicial proceedings so authenticated shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken.[3] And all records and exemplifications of books which may be kept in any public office of any state or territory, or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any other state or territory, or in any such country, by the attestation of the keeper of the said record, or books, and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county, parish, or district, in which such office may be kept, or of the governor, or secretary of state, the chancellor or keeper of the great seal of the state, or territory or country, that said attestation is in due form, and by the proper officers. If the said certificate be given by the presiding justice of a court, it shall be further authenticated by the clerk or prothonotary of the said court, who shall certify under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or, if the certificate be given by such governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the state, territory or such country aforesaid, in which such certificate is made.

And that the said records and exemplifications so authenticated, shall have such faith and credit given them in every court and office within the United States as they have by law or usage in the courts or offices of the state, territory or country, as aforesaid, from which they are taken.[4]

It has been held that the judgments of justices of the peace

3. U. S. Rev. Statutes, Sec. 905.
4. U. S. Rev. Statutes, Sec. 906.

are not within these provisions in the laws of the United States.[5]

The seal of the court must be annexed to the record with the certificate of the clerk, and not to the certificate of the judge.[6]

If the court whose record is certified has no seal, that fact should appear either in the certificate of the clerk, or in that of the judge. If the court itself is extinct, but its records and jurisdiction have been transferred by law to another court, the clerk and judge of the latter tribunal can make the requisite attestations. It must appear from the judge's certificate that at the time of certifying he is the presiding judge of that court. and the clerk who certifies to the record must be himself at the time of the certificate, the clerk of the same court, or of its successor. Such certificate must not be made by a clerk, by his deputy, or under clerk, or by the clerk of another tribunal, office, or body.[7]

The provisions of these general laws of the United States are constitutional provisions.[8]

A state, however, may adopt other methods for authenticating the public records of other states and territories, and copies of such records authenticated as provided by the laws of a state are admissible in evidence in the courts of that state.[9]

In California, by statute, a judicial record of that state, and a judicial record of the United States, may be proved by the production of the original, or by a copy thereof certified by the clerk or other person having the legal custody thereof; and the judicial record of a sister state may be proved by the attestation of the clerk and the seal of the court annexed, if there be a clerk and seal, together with a certificate of the chief judge or presiding magistrate, that the attestation is in due form.[10]

When the copy of a writing is certified under the laws of that state, for the purpose of evidence, the certificate must state in substance that the copy is a correct copy of the original, or of a specified part thereof, as the case may be; and the certifi-

5. 1 Greenleaf Ev., Sec. 505.
6. 1 Greenleaf Ev., Sec. 506.
7. 1 Greenleaf Ev., Sec. 506.
8. U. S. Const., Art. IV., Sec. 1.
9. 1 Greenleaf Ev., Sec. 505.
10. Code of Civil Procedure, Sec. 1905.

cate must be under the official seal of the certifying officer, if there be such seal, or if he be the clerk of a court having a seal, under the seal of the court.[11]

Copies of public writings are admissible in evidence in the courts of California in the following cases:

1. Books printed or published under the authority of a sister state or foreign country, and purporting to contain the statutes, code or other written law of such state or country, or proved to be commonly admitted in the tribunals of such state or country as evidence of the written law thereof, are admissible in that state as evidence of such law.[12]

2. A copy of the written law or other public writing of any state or country, attested by the certificate of the officer having charge of the original, under the public seal of the state or country, is admissible as evidence of such law or writing.[13]

3. Printed and published books of reports of decisions of the courts of a sister state, or a foreign country, or proved to be commonly admitted in such courts, and the oral testimony of witnesses skilled in the unwritten laws of such sister state or foreign country is admissible as evidence of such unwritten law.[14]

4. A copy of a public writing, which a citizen has a right to inspect, certified to by the officer having the custody of the same, is admissible as evidence in like cases, and with the like effect as the original writing.[15]

5. A copy of a judicial record of a foreign country attested by the clerk, with the seal of the court annexed, if there be a clerk and seal, or attested by the legal keeper of the record with the seal of his office annexed, if there be a seal, together with a certificate of the chief judge or presiding magistrate, that the person making the attestation is the clerk of the court, or the legal keeper of the record, and in either case, that the signature of such person is genuine, and that the attestation is in due form; and the authentication of the signature of the chief judge, or presiding magistrate, must be by the certificate of the

11. Code of Civil Procedure, Sec. 1923.
12. Code of Civil Procedure, Sec. 1900.
13. Code of Civil Procedure, Sec. 1901.
14. Code of Civil Procedure, Sec. 1902.
15. Code of Civil Procedure, Sec. 1893.

minister or ambassador, or of the consul, vice consul, or consular agent of the United States in such foreign country.[16]

6. A copy of the judicial record of a foreign country is admissible in evidence, upon proof, that such copy has been compared by the witness with the original, and that it is an exact transcript of the whole of the original, and that such original was in the custody of the clerk of the court, or other legal keeper of the same, and that such copy is duly attested by the seal of the court where the record remains, proven to be such seal, if such original be the record of a court; or if there be no such seal, or if the original is not the record of a court, that the copy is attested by the signature of the legal keeper of the original.[17]

Acts of the executive of California may be proven in that state by the records of the state department of the state, and acts of the executive of the United States may be proven by the records of the state department of the United States, certified by the heads of those departments respectively. They may also be proven by public documents printed by the order of the legislature or congress, or either house thereof.[18]

The proceedings of the legislature of that state or of congress may be proven by the journals of the legislature of the state, or of congress, or of either house thereof, or by published statutes or resolutions of the state or of congress, or by copies of such statutes or resolution certified by the clerk, or printed by the order of such legislature or congress. The acts of the executive or the proceedings of the legislature of a sister state may be proven in the same manner.[19]

The acts of the executive, or the proceedings of the legislature of a foreign country, may be proven, by journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country, or sovereign, or by a recognition thereof in some public act of the executive of the United States.[20]

A copy of the acts of a municipal corporation of California

16. Code of Civil Procedure, 1906.
17. Code of Civil Procedure, Sec. 1907.
18. Code of Civil Procedure, Sec. 1918.
19. Code of Civil Procedure, Sec. 1918.
20. Code of Civil Procedure, Sec. 1918.

or of a board, or department thereof, certified by the legal keeper thereof, or by a printed book published by the authority of such corporation, are in California, evidence of such acts.[21]

An original public document of any other class in California or copy thereof certified by the legal keeper of such original, is admissible in evidence in that state.[22]

The original public document of any other class in a sister state, or a copy of such original document certified by the legal keeper thereof, together with the certificate of the secretary of state, judges of the Supreme Court, Superior or County Court, or mayor of a city of such state, that the copy is duly certified by the officer having the legal custody of the original, is admissible as evidence, in California.[23]

13. The original public document of any other class in a foreign country, or a copy of such original document, certified by the legal keeper thereof, with a certificate under the seal of the country or sovereign that the document is a valid and subsisting document of such country and that the copy is duly certified by the officer having the legal custody of the original, is admissible as evidence in California.[24]

A certificate of the legal custodian of a document in a department of the United States government duly made is evidence of such document.[25]

The original public record of a private writing, or a copy thereof certified by the legal keeper of the record is evidence of such record in California.[26]

A transcript from the record or docket of a justice of the peace of a sister state of a judgment rendered by him, of the proceedings in the action before the judgment, of the execution and return, if any, subscribed by the justice, when there is attached to the transcript a certificate of the justice that the transcript is in all respects correct, and that he had jurisdiction of the action, and a further certificate of the clerk or prothonotary of the county in which the justice resided at the time of the

21. Code of Civil Procedure, Sec. 1918.
22. Code of Civil Procedure, Sec. 1918.
23. Code of Civil Procedure, Sec. 1918.
24. Code of Civil Procedure, Sec. 1918.
25. Code of Civil Procedure, Sec. 1918.
26. Code of Civil Procedure, Sec. 1919.

rendering of the judgment, under the seal of the county, or the seal of the court of commons pleas, or county court thereof, certifying that the person subscribing the transcript was at the date of the judgment, a justice of the peace in that county and that the signature is genuine, is evidence of the facts stated in such transcript. Such judgment, proceedings, and jurisdiction may also be proved by the justice himself, on the production of his docket, or by the copy of the judgment, and his oral examination as a witness.[27]

The provisions of the sections of the Code of Civil Procedure of California applicable to the public writings of a sister state as evidence, are equally applicable to the public writings of the United States or of a territory of the United States.[28]

Under the statutes of California, entries in public or other official books or records made in the performance of his official duty by a public officer of that state, or by another person in the performance of a duty specially enjoined by law, and entries made by an officer or board of officers, or under the direction or in the presence of either, in the course of official duties, are prima facie evidence of the facts stated therein.[29]

Courts take judicial notice of the seals of state of each of the sovereign powers in the civilized world, and public acts, decrees and judgments exemplified under such seal are received as true and genuine, without further proof.[30] Independent of statutory provisions on the subject, foreign judgments are authenticated:

1. By an exemplification under the great seal of a state.
2. By a copy proved to be a true copy.
3. By the certificate of an officer authorized by law, which certificate must itself be properly authenticated.[31]

Such copy can be proven to be a true copy of the original, and the existence of the original can be proven by the deposition of a witness taken under a commission issued for that purpose by the court in which the evidence is to be used.[32]

27. Code of Civil Procedure, Secs. 1921, 1922.
28. Code of Civil Procedure, Sec. 1924.
29. Code of Civil Procedure, Secs. 1920, 1926.
30. 1 Greenleaf Ev., Sec. 4.
31. 1 Greenleaf Ev. Sec. 488.
32. Church v. Hubbard, 2 Cranch 238.

Such deposition must be regularly taken under legal proceedings duly pending, and it has been stated by high authority, that the taking of depositions of witnesses in foreign countries under a commission issued by a court of justice and to be used in that court in legal proceedings pending therein, was deemed to be within the inherent powers of such court.[33]

By statute law in most, if not all of the states of this country, provisions have been made for the taking of such depositions.

By the rules of the common law, acts of state may be proved by production of the original printed acts from a press authorized by government; proclamations and other acts and orders of the executive of like character may be proved by the production of the government gazette, in which they were authorized to be printed; printed copies of public documents transmitted to congress by the president of the United States and printed by the printer to congress, are evidence of those documents; the certificate of the secretary of state is evidence that a particular person has been recognized as a foreign minister; the certificate of a foreign governor duly authenticated is evidence of his own officials acts; in most, if not all the states in this country, the printed copies of the law and resolves of the legislature of a state, purporting to be printed by the authority of the state, are competent evidence of such laws and resolutions, with the exception of private statutes, and if a private statute contains a provision that it shall be taken notice of, as if it were a public act, then such printed copy is evidence of such private statute; private statutes of the same state or of other states, can be proved, by a copy, proven on oath to have been examined by the roll itself, or, by an exemplification under the great seal; legislative journals may be proven by examined copies; entries of public writings in books kept by persons in public office in which such public officers are required to write down particular transactions occurring in the course of their public duties, or under their personal observation, may be proved by the books themselves, or by copies thereof proven to be such copies, or otherwise duly authenticated, and

33. 1 Greenleaf Ev., Sec. 320.

such entries are evidence of the facts therein stated; such entries, however, must be of matters required to be entered therein in the performance of official duty; laws of a foreign country may be proved by a copy of such laws exemplified as such copy by the great seal of state of such country, or by other evidence under oath, of such laws, after it is first proven that such exemplified copy cannot be procured.

Unwritten laws of a foreign country or of a sister state can be proved by the testimony of witnesses instructed in such unwritten laws; an approved and public general history is admissible to prove ancient facts of a public nature and the general usages and customs of a country; contents of a lost record, after proof of such loss, may be proved by secondary evidence.[34]

Judgments in some cases may be proven as facts in an action, although the parties to such action were not parties to the action in which the judgment was rendered.[35]

When a foreign court has rendered a judgment in personam, the jurisdiction of such court, and its power over the parties and the things in controversy may be inquired into, and such judgment may be impeached for fraud.[36]

It is declared by statute in California, that any judicial record may be impeached by evidence of want of jurisdiction in the court or judicial officer, of collusion between the parties, or of fraud in the party offering the record, in respect to the proceedings.[37]

When a judgment is attacked for collusion between the parties to the judgment, or for fraud on the part of the person offering the judgment, such attack may be made in the action in which such judgment is offered under allegations in the pleadings showing such collusion or fraud.[38]

34. 1 Greenleaf Ev., Secs. 479, 481, 482, 483, 484, 486, 487, 488, 489; 497; 509.
35. 1 Greenleaf Ev., Secs. 538, 539.
36. 1 Greenleaf Ev. Sec. 547.
37. Code of Civil Procedure, Sec. 1916.
38. Pom. Equity Jur. Sec. 919.

CHAPTER XXIV.

OF THE TESTIMONY OF WITNESSES AND THEIR EXAMINATION.

The most important means for the proof of facts in issue in an action is the oral testimony of witnesses who are duly sworn, or affirmed, to testify to the truth in the action.

Such testimony is either given in open court on the trial of the action, or it is given in a deposition taken on notice to the opposite party; if the deposition be not taken in the state in which the deposition is to be used, the testimony of the witness is taken under and by virtue of a commission issued out of the court in which such testimony is to be used, and is usually taken on interrogatories and cross interrogatories settled by the court issuing the commission, and which are attached to the commission.

The method of taking and of returning such depositions to be used in a state, are prescribed by the statutes of such state, and the methods so prescribed must be followed, otherwise such depositions are not admissible in evidence.

When such deposition is taken on notice, objections to questions asked the witness in taking the testimony, if improper in form, should be made at the time the deposition of the witness is taken and should be entered in the deposition by the person taking it, and such objections and other objections to questions, are ruled on, by the court, at the time such deposition is read in evidence.

The testimony of a witness taken by deposition is not as satisfactory as the testimony would be, if given in open court, since the court or jury who are to determine questions of fact, have not the opportunity to notice the manner of the witness when his testimony is given in a deposition, which they would

have, if such testimony were given by the witness in open court, on the trial of the action.

Under the code system, neither a party to an action or proceeding, nor any other person who has an interest in the event of an action or proceeding, are excluded from testifying, except in the cases hereinafter mentioned, nor are persons who have been convicted of a crime, nor persons on account of their religious belief, excluded from testifying.[1]

But persons of unsound mind, children under ten years of age, who appear incapable of receiving just impression of the facts respecting which they are examined, or of relating them truly, are not competent as witnesses; and in California parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator, upon a demand against the estate of a deceased person, are not competent as witnesses, as to any matter of fact occurring before the death of such deceased person.[2]

But this rule does not prevent a person from testifying to facts showing a defense to an action brought against him by such executor or administrator when such defense does not amount to a counter claim;[3] nor does it prevent a person from testifying in an action by him against an executor or administrator, to enforce a lien on the real estate of a deceased person, or to enforce a resulting trust when no judgment is asked, except for the enforcement of such lien, or to enforce such resulting trust.[4]

Public policy will preclude either a husband or wife from testifying against the other without the consent of the other, either during their marriage, or after dissolution of such marriage; as to any communication made by one to the other during marriage, except in a civil action or proceeding by one against the other, or in a criminal action for a crime committed by one against the other.

Public policy will preclude an attorney from testifying with-

1. Code of Civil Procedure, Sec. 1879.
2. Code of Civil Procedure, Sec. 1880.
3. Sedgwick v. Sedgwick, 52 Cal. 336.
4. Booth v. Pendola, 88 Cal. 36; Myers v. Reinstein, 67 Cal. 89.

out the consent of his client as to any communication made by his client to him or as to his advice given thereon in the course of professional employment; and also precludes without the consent of his employer, the attorney's secretary, stenographer, or clerk, from testifying concerning any fact, the knowledge of which he has acquired in the course of and by reason of such employment.

Public policy also precludes a clergyman or priest, without the consent of the person making a confession, from testifying to any confession made to him in his professional character, in the course of discipline enforced by the church to which he belongs; and precludes a licensed physician or surgeon without the consent of his patient, from testifying in a civil action, as to any information acquired in attending on the patient, which was necessary to enable him to prescribe or act for the patient. This rule as to physicians and surgeons does not extend to a criminal action.

Public policy also precludes a public officer from testifying as to communications made to him in official confidence, when the public interest would suffer by the disclosure.[5]

When a witness does not understand and speak the English language, an interpreter must be sworn, to interpret for him.

The process by which the attendance of a witness is compelled is a subpoena, and such subponea may require the witness to bring with him any books, documents or other things under his control, which he is bound by law to produce in evidence.[6]

In California, a witness cannot be compelled to attend as a witness in a civil action at any place outside of the county of his residence, unless such place be within thirty miles of the place of residence of the witness.[7]

Whenever an object cognizable by the senses has such a relation to the fact in dispute, as to afford reasonable grounds of belief respecting it, or to make an item in the sum of the evidence, it may be exhibited to the jury, or its existence, situation and character may be proved by witnesses. The admission

5. Code of Civil Procedure, Sec. 1881.
6. Code of Civil Procedure, Sec. 1985.
7. Code of Civil Procedure, Sec. 1989.

of such object as evidence is to be regulated by the sound discretion of the court.[8]

Diagrams, models and maps when proven to be substantially correct, may be used by a witness to explain his testimony.

Photographs of objects when proven to be correct, and to have been taken about the time of an occurrence in respect to which the object itself could be used as evidence, and it has been proven that there was no change in such object between the time of such occurrence and the time of the taking of the photographs, are admissible in evidence in connection with the testimony of witnesses relative to such occurrence.[9]

Photographic copies of writings are secondary evidence of the contents of the original, and can only be used in the cases in which secondary evidence of such originals can be used.[10]

A witness may refresh his memory respecting a fact by anything written by himself or under his direction at the time the fact occurred, or when the fact was fresh in his memory, and he knew the same was correctly stated in the writing when such writing was made. The witness may testify from such writing, although he retains no recollection of the particular facts therein stated, but remembers that he saw the writing while the facts were fresh in his memory, and that he knew then, that the particulars therein mentioned were correctly stated.

In either case, however, the writing must be submitted to the adverse party who may cross-examine the witness upon it.[11]

A party to any action is not permitted to ask a witness produced by him a leading question, that is a question which suggests to the witness the answer which the examining party desires, except in the sound discretion of the court, when the interest of justice requires it.[12]

There is no definite rule as to what is or what is not a leading question. As a general rule, however, a question which admits of an answer by a single negative or affirmative is a leading question.

8. Code of Civil Procedure, Sec. 1954.
9. Gilbert v. West End St. Ry, Co., 160 Min. 403.
10. McLean v. Scripps, 52 Mich. 214.
11. Code of Civil Procedure, Secs. 2047, 2048; 1 Greenleaf Ev., Sec. 436.
12. Code of Civil Procedure, Sec. 2046.

Leading questions which call for answers which are merely introductory to that which is material are not objectionable.[13]

It has been held that a question framed in the alternative, and to which the answer may be a simple negative or affirmative is not leading;[14] but such question may be so framed as to suggest the desired answer; in which case the question is leading.[15]

On cross-examination of a witness, he may be asked leading questions as to matters concerning which he has testified on his direct examination, but not as to other matters,[16] except when the court in the exercise of a sound discretion and in the interest of justice permits this to be done.

As a general rule, a witness can testify only as to such facts as are within his own knowledge, and this he can do, although his recollection as to the existence of such facts does not amount to a positive assurance that they did exist.[17]

A witness cannot testify as to his opinion of the existence of a fact nor upon a question of science, art, or trade, unless he be first shown to be skilled therein.

A witness, however, who is proven to have knowledge of a person, or of his handwriting, or of a thing, is permitted to testify as to his belief as to the identity of such person, or thing, and as to whether the handwriting shown to the witness is the genuine handwriting of a particular person; and a subscribing witness to a will may testify as to his opinion in respect to the sanity of the testator at the time of executing the will;[18] and in California, the subscribing witness to a writing can testify his opinon in respect to the sanity of the signer of the writing at the time it was signed; and if an intimate acquaintance of a person, the witness can testify as to his opinion respecting the mental sanity of such person, giving his reason for such opinion.[19]

A witness may derive his knowledge of the handwriting of a person from having seen him write, or having seen writings purporting to be the writings of such person, upon which the wit-

13. 1 Greenleaf Ev., Sec. 434.
14. Adams v. Harrold, 29 Ind. 198.
15. 23 Pa. St. 143, 440; People v. Mather, 21 Am. Dec. 122.
16. 1 Greenleaf Ev., 445; Code of Civil Procedure, 2048.
17. 1 Greenleaf Ev., Sec. 440.
18. 1 Greenleaf Ev., Sec. 440.
19. Code of Civil Procedure, Sec. 1870.

ness has acted or has been charged, or by an inspection of, and comparison with the handwriting of such person admitted or proved to be the genuine handwriting of such person. Such writings may be inspected and compared by the jury;[20] and this seems to be the general rule in this country.[21]

A witness will be permitted to testify as to the act, declaration, or omission of a party to an action, when the same is in dispute, and to the act or declaration of another in pursuance of and within the observation of such party, and his conduct in relation thereto, when such act, declaration, omission and conduct is admissible as evidence against such party; and to the act or declaration of a deceased person in respect to the relationship, birth, marriage or death of any person related by blood or marriage to such deceased person, and to the act or declaration of a deceased person done or made against his interest in respect to his real property; and after proof of a partnership or agency, a witness can testify to the act or declaration of a partner or agent within the scope of the partnership or agency and during its existence; and the same rule applies to the act or declaration of a joint debtor or joint owner or other person jointly interested with the party; and after proof of a conspiracy, a witness may testify to the act or declaration of a conspirator, during the existence of the conspiracy, against his co-conspirators and relating to the conspiracy; and to an act, declaration, or omission which forms a part of a transaction which is itself the fact in dispute or evidence of that fact.

A witness may also testify what the testimony of a witness who is dead, or out of the jurisdiction of the court, or unable to testify, was, in a former action between the same parties and relating to the same matter.

A witness may also testify to the common reputation, previous to the controversy, respecting facts of a public or general interest, more than thirty years old, and in cases of pedigree or boundary; and a witness may give testimony as to usage to to explain the true character of an act, contract, or instrument, where such true character is not otherwise plain, and to monuments and inscriptions in public places, as evidence of common

20. Code of Civil Procedure, Secs. 1943 1944.
21. 1 Greenleaf Ev., Sec. 576, et. seq.

reputation, and to entries in a family Bible, or other family books or charts, engravings on rings, family portraits and the like, as evidences of pedigree, and to the general reputation of a witness for truth, honesty or integrity when the truth, honesty or integrity of such witnesses is called in question.[22]

A witness may testify as to the circumstances under which an instrument in writing was made, including the situation of the subject of the instrument and of the parties to it, for the purpose of enabling the court to interpret the meaning of such instrument as understood by the parties thereto at the time of its execution; and may testify to the local, technical, or otherwise peculiar signification of the language of the instrument as used and understood by the parties thereto for the like purpose of enabling the court to interpret the instrument as so understood: and when the characters in the instrument are difficult to be deciphered or the language of the instrument is not understood by the court, the testimony of witnesses skilled in deciphering such characters, or who understand the language is admissable to declare the character, or the meaning of the language.[23]

The testimony of witnesses is admissible to prove that a written contract has been altered by an executed oral agreement.[24]

22. Code of Civil Procedure, Sec. 1870.
23. Code of Civil Procedure, Secs. 1860, 1861, 1863.
24. Civil Code, Sec. 1698.

CHAPTER XXV.

OF HEARSAY EVIDENCE AND OF THE CONTRADICTION OF WITNESS BY THE PARTY PRODUCING SUCH WITNESS.

Greenleaf defines hearsay evidence to be a kind of evidence which does not derive its value solely from the credit to be given to the witness himself, but rests also in part on the veracity and competency of some other person, and states that such evidence is uniformly incompetent to establish any *specific fact,* which, in its nature, is susceptible of being proved by witnesses who can speak from their own knowledge.[1]

And he states cases in which evidence usually called hearsay, is in fact original evidence, and admissible as original evidence, namely:

First, when the *fact* that the declaration was made, and not its truth or falsity, is the point in question;

Second, expressions of bodily or mental feelings, when the existence of such feelings is the subject of inquiry;

Third, cases of pedigree, and including the declarations of those nearly related to the party whose pedigree is in question;

Fourth, all other cases where the declaration offered in evidence may be regarded as a party of the *res gestae.*

What a party to an action has said may be a matter in question, in an action; and in many cases what a party to an action has said, or his conduct, may be a fact, from which the matter in question in the action, may be inferred.

Testimony of the statement, or of an admission by a party to an action, whether such admission be by statement or conduct, is testimony of a fact from which the matter in question may be presumed, and it is circumstantial evidence.

1. 1 Greenleaf Ev., Sec. 98.

Such admissions, however, should be received with great caution.[2]

Declarations when so connected with acts as to illustrate the character of such acts, and when contemporaneous with such acts, are a part of the *res gestae,* are original evidence and admissible as such evidence.[3]

The whole admission of a person is to be received and taken together.[4]

The party to an action who produces a witness to testify in an action will not be permitted to impeach such witness by testimony as to his general reputation for truth, honesty or integrity, but he may prove by other witnesses that the facts testified to by such witness are different from what the testimony of such witness states them to be; and it has been held, and is so declared by statute in California, that if such witness had previously made statements inconsistent with his testimony, this may be shown by the party calling such witness, after such previous statements have been related to him, with the circumstances of times, places, and persons present, and after he has been asked whether he made such statements, and if so, allowed to explain them.

If such statements be in writing, they must be shown to the witness before any question concerning them is put to him.[5] Greenleaf states that the rule at common law was the same.[6]

But the evidence as to such former statements is not to be received as any evidence of the truth of the facts in such former statements contained, but are only evidence showing, or tending to show, that the testimony of the witness as to such facts, given on the trial of the action, is incorrect, or untrue.

2. 1 Greenleaf Ev., Sec. 200.
3. 1 Greenleaf Ev., Sec. 108.
4. 1 Greenleaf Ev., Sec. 201.
5. Code of Civil Procedure, Secs. 2052, 2049.
6. 1 Greenleaf Ev., Sec. 442 et seq.

CHAPTER XXVI.

OF THE CROSS-EXAMINATION AND IMPEACHMENT OF WITNESSES.

A party to an action is entitled to have a full cross-examination of a witness produced by the adverse party as to all matters testified to by such witness on his direct examination; and such cross-examination should be permitted to the extent of showing the situation of the witness with respect to the parties, to the action, and to the subject of litigation, his interest, his motives, his means of obtaining a correct and certain knowledge of the facts, as to which he gives testimony, and his powers of discernment and memory.

If, however, on cross-examination, a witness be examined as to collateral facts, his testimony as to such collateral facts cannot be contradicted.[1]

Each party may impeach the credibility of a witness of the opposite party, by testimony affecting the general reputation of such witness for truth, honesty or integrity; and by evidence that he has made at other times statements inconsistent with his present tesimony; but before such statements can be introduced in evidence, the statements must be related to the witness with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them; and if the statements be in writing, they must be shown to the witness before any question is put to him concerning them.[2]

If the witness says he cannot remember whether he spoke the words or not, this is sufficient to allow the introduction of evidence that he did speak them.[3]

1. Greenleaf Ev., Sec. 445 et seq.
2. 1 Greenleaf Ev., Sec. 462 et seq.; Code of Civil Procedure, Sec. 2052.
3. Payne v. State, 60 Ala. 80.

But it is only in such matters as are relevant to the issue that a witness can be contradicted.[4]

But if the witness has expressed hostility to or a bias against the party cross-examining him, and denies that he has so expressed himself, his testimony as to such matters may be contradicted by the testimony of other witnesses.[5]

If the witness denies having made the contradictory statements inquired of, and a witness is called to prove that he did make them, it has been held that the particular words must not be put, but the witness must be required to relate what passed.[6]

Evidence of the good character of a party, in a civil action, or of a witness in any action, is not admissible until the character of such party or witness has been impeached, or unless the issue involves his character.

In impeaching the credit of a witness for truth, honesty or integrity, the examination must be confined to evidence of his general reputation as to such traits of character where he dwells, or among persons with whom he is chiefly conversant; and when the impeaching witness shows that he has such knowledge, then the witness may testify as to whether such reputation is good or bad; but the person calling the witness whose credit is sought to be impeached, should have the fullest opportunity of cross-examination of the impeaching witness as to his knowledge and means of knowledge of such reputation, before the impeaching witness will be permitted to testify whether such reputation is good or bad. If the impeaching witness shows that he has knowledge of such reputation he then may testify whether such reputation is good or bad, and in England, and in some of the states, the impeaching witness is further permitted to testify whether from such knowledge he would believe upon his oath the witness whose credit is so sought to be impeached.

The party who has called the witness whose credit is sought to be impeached may attack the general character of the impeaching witness, and by fresh evidence as to his general reputation, support the character of his own witness.[7]

4. 1 Greenleaf Ev., 462.
5. 1 Greenleaf Ev., Sec. 450; Newton v. Harris, 2 Seld 345.
6. Hallet v. Cousens, 2 M. and Rob. 238.
7. 1 Greenleaf Ev., Sec. 461.

A witness may decline to answer any question the answer to which will have a tendency to expose the witness to penal liability, to any kind of punishment, to a criminal charge, or to a forfeiture of property.

This is a personal privilege of the witness. Whether the answer may tend so to expose the witness is a point on which the court is bound to instruct the witness, and which the court will determine under all the circumstances of the case, but without requiring the witness fully to explain how he might be criminated by the answer.

Where the transaction to which the witness is interrogated forms any part of the issue to be tried, the witness will be required to give evidence however strongly it may reflect on his character.

But when the question is not material to the issue, the witness will not be required to answer the question if such answer has a direct tendency to degrade the character of the witness.

Record evidence may be introduced to show a previous conviction of a witness of a crime subjecting him to an ignominious punishment.[8]

In California, by statute, a witness must answer as to the fact of his previous conviction for a felony.[9]

The evidence on the trial of an action must correspond with the allegations and be confined to the points in issue, and all questions as to collateral facts except on cross-examination should be strictly excluded.[10]

The common law rule which renders incompetent as witnesses, parties to the action, persons interested in the result of the action, the judge before whom the action is tried, atheists and infidels, and persons infamous because convicted of heinous crimes, does not exist in California, nor does it exist in some of the states which have adopted the code system of civil remedies.

In California the judge himself or any juror may be called as a witness by either party; but in such case it is in the discretion of the court or judge to order the trial suspended or postponed, and that it take place before another judge or jury.

8. 1 Greenleaf Ev., Sec. 451 et seq.
9. Code of Civil Procedure, 2065.
10. 1 Greenleaf Ev., Sec. 448.

CHAPTER XXVII.

OF SOME RULES OF EVIDENCE DECLARED BY THE SUPREME COURT AND BY STATUTE IN CALIFORNIA.

Press copies of writings, if they exist, are next after the originals, the best evidence of the contents of such originals.[1]

A written receipt is open to explanation by parol evidence.[2]

Secondary evidence of the contents of an original writing is admissible, unless objected to on the trial of an action.[3]

A delivery of a patent of the United States for land is not necessary to pass the legal title to the land, if the patent has been duly signed and recorded.[4]

A letter beyond the territory of the state is within the meaning of the statute "lost," so as to allow secondary evidence of its contents.[5]

The record in the office of a county recorder of a power of attorney acknowledged only by one of the three persons, who, it is claimed, executed the power, is evidence, under sections 1855 of the Code of Civil Procedure of the contents of the original.[6]

It was held in Brown v. Griffeth, 70th Califorina reports 14, that under section 1951 of the Code of Civil Procedure, as it then was, the contents of an original private writing could not be proven, by the record thereof, unless the absence of such original was first satisfactorily accounted for, but since the amendment of section 1951 of that code in 1889, such evidence is admissible, without such preliminary evidence.[7]

A copy of a certified copy of an original writing, which orig-

1. Ford v. Cunningham, 87 Cal. 209.
2. Comptoir D'Escompte de Paris v. Dresbach, 78 Cal. 15.
3. Wright v. Rosberry, 81 Cal. 87.
4. Crus v. Martines, 58 Cal. 239.
5. Zellerbach v. Allenberg, 99 Cal. 58.
6. Spect v. Gregg, 51 Cal. 198.
7. Code of Civil Procedure, as amended in 1889.

inal writing is lost, is not evidence of the contents of such original.[8]

A written statement of facts made by an agent within the scope of his authority is admissible as evidence against his principal.[9]

An original answer in an action which has been superseded by an amended answer is not admissible;[10] but in Coward v. Clanton, 79 Cal. 23, such answer was held to be admissible in evidence as an admission made by the defendant.

The evidence of an original complaint which has been superseded by an amended complaint is not admissible except to impeach the plaintiff, if a witness in the action.[11]

Under the rule in Coward v. Clanton, the superseded complaint might, perhaps, in some cases, be introduced in evidence as an admission.

When a deed is executed and there is a question as to its delivery, what the grantor has said against such delivery, is not admissible, but what he said in favor of such delivery in another conversation is admissible.[12]

The statement by a testator, in his will, duly admitted to probate, that a person named in such will, was his wife is competent evidence of that fact, and his statement in the same will, that certain other persons named therein were his children, was competent evidence that they were his legitimate children.[13]

In the absence of ambiguity in a contract, it cannot be changed by parol testimony, except in an action in equity to reform the written contract.[14]

Parol evidence is admissible, when it relates to the execution, authenticity or delivery, of a written instrument.[15]

A postscript to a genuine letter may be shown to have been added after the letter was written, and without authority to do so.[16]

8. Dyer v. Hudson, 65 Cal. 372.
9. Kamm v. Bank of California, 74 Cal. 191.
10. Osment v. McElrath, 68 Cal. 466; Stern v. Lowenthal, 77 Cal. 340.
11. Johnson v. Powers, 65 Cal. 179.
12. Ord v. Ord, 99 Cal. 523.
13. Pearson v. Pearson, 46 Cal. 609.
14. Harrison v. McCormick, 89 Cal. 327; Irving v. Cunningham, 66 Cal. 15; Swain v. Grangers' Union, 69 Cal. 186.
15. Verzan v. McGregor, 23 Cal. 339
16. Robinson v. Nevada Bank, 81 Cal. 106.

Parol evidence to show the true consideration of a written contract is admissible;[17] but if the consideration for a note was something to be done, and this is expressed in the written instrument, it is not competent to show that something else was to be done;[18] and when a part of a contract be illegal, and the contract is indivisible, the contract cannot be enforced.[19]

Parol evidence is always admissible to show the circumstances under which a written contract was made, including the situation of the subject of the instrument, and of the parties to it, to enable the court to arrive at its meaning.[20]

Evidence is admissible of a parol contemporaneous agreement fixing the time of the performance of a written contract, when such time is not fixed by the terms of the written contract.[21]

It is competent for the legislature at any time to adopt rules of evidence.[22]

If irrelevant evidence is received subject to a motion to strike out, if no such motion be made, the adverse party is presumed to have acquiesced in its admission.[23]

The transcript from the shorthand reporter's notes, certified to, as prescribed by statute, is not evidence of what a witness on the former trial of an action, said as such witness.[24]

The whole of the admission on the same subject must be admitted.[25]

An offer to prove, must specify the particular fact offered to be proved.[26]

An objection to evidence should state the particular grounds of the objection.[27]

The power of a jury of judging of the effect of evidence is not arbitrary, but this power is to be exercised with legal discretion and in subordination to the rules of evidence.

17. Hendrick v. Cowley, 31 Cal. 471; Moffat v. Bulson, 96 Cal. 106.
18. Langan v. Langan, 89 Cal. 186.
19. Moffat v. Bulson, 96 Cal. 106.
20. Preble v. Arbahams, 88 Cal. 245.
21. Sivers v. Sivers, 97 Cal. 518.
22. McDonald v. Conniff, 99 Cal. 387.
23. Cederberg v. Robinson, 100 Cal. 94.
24. Reid v. Reid, 73 Cal. 206.
25. Spanagel v. Dellinger, 38 Cal. 279.
26. Stevens v. Railroad Co., 100 Cal. 554.
27. Kiler v. Kimball, 10 Cal. 267.

A jury is not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in their minds, against a less number or against a presumption or other evidence, satisfying their minds.

A witness false in one part of his testimony is to be distrusted in others.

The testimony of an accomplice ought to be viewed with distrust and the evidence of oral admissions of a party, with caution. In civil cases, the affirmative of the issue must be proved.

If weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust.[28]

Each party must prove his own affirmative allegation.[29]

A patent for land issued by the United States may be proven by producing from the recorder's office, the book within which it was recorded without proof of the loss of the original.[30]

Courts will take judicial notice of the time of harvest in the counties where they preside,[31] of the laws in force in California at the time of its conquest,[32] as to the persons who hold the various county offices within their jurisdiction and of the genuineness of their signatures,[33] of the offices of a county and of the genuineness of their official signatures, and of the genuineness of the signatures of such deputies as the law authorizes them to appoint,[34] of the signatures of the officers of the court, but not of the signatures of the party to the cause,[35] of the decisions of the court,[36] of the proceedings in an action before it upon a proceeding therein for contempt,[37] of the United States census returns,[38] of county boundaries and of the location of lands described by government, by township, range and sections and

28. Code of Civil Procedure, Sec. 2061.
29. Code of Civil Procedure, Sec. 1869.
30. Vance v. Kohlberg, 50 Cal. 346.
31. Mahony v. Arrecochea, 51 Cal. 429.
32. Ohm v. San Francisco, 92 Cal. 437.
33. Wetherbee v. Dunn, 32 Cal. 106.
34. Himmelmann v. Hoadley, 44 Cal. 213.
35. Alderson v. Bell, 9 Cal. 315.
36. Sharon v. Sharon, 84 Cal. 424.
37. Ex parte Ah Men, 77 Cal. 198.
38. People v. Williams, 64 Cal. 87.

subdivision of sections,[39] of possession by a city of its public lands,[40] and of the streets of San Francisco and of the directions in which they run.[41]

Courts will not take judicial notice of the location of lands designated simply by name, or by reference to a private survey.[42]

Books of account when properly kept are competent evidence to prove the delivery of the goods therein charged, when the nature of the subject is such as not to render better evidence attainable.[43]

The jury are at liberty to use their own judgment in matters of handwriting.[44]

The opinion of medical experts as to the value of medical services is not conclusive; such opinion is not to be substituted for the common sense of the jury, and such opinion is to be viewed with scrutiny and much caution.[45]

The court must determine whether a witness is an expert in respect to matters concerning which his opinion is asked.[46]

A witness called as an expert should be examined, and if it be desired by the opposite party, cross-examined, to show whether the witness was competent to testify as an expert before he is permitted to testify as to his opinion.[47]

If a writing on its face is a complete expression of the agreement of parties, parol evidence is not admissible to add another term to the agreement,[48] except fraud or mistake be alleged, or the action be one to reform the contract.

The testimony of a witness which tends to contradict or limit the operation of deeds in evidence is inadmissible.[49]

In an action at law, parol evidence is not admissible to contradict or vary the terms of a written instrument, the instrument can only be reformed or corrected in an action in equity.[50]

39. Campbell v. West, 86 Cal. 197.
40. Labory v. Los Angeles, 97 Cal. 270.
41. Williams v. Savings and Loan Society, 97 Cal. 122.
42. Campbell v. West, 86 Cal. 197.
43. Severance v. Lombardo, 17 Cal. 57.
44. Haight v. Vallet, 89 Cal. 245.
45. McLean v. Crow, 88 Cal. 644.
46. Fairbanks v. Hughson, 58 Cal. 314.
47. People v. Hawes, 98 Cal. 648.
48. Harrison v. McCormick, 89 Cal. 327.
49. Judson v. Malloy, 40 Cal. 299.
50. Irving v. Cunningham, 66 Cal. 15.

When parties reduce their agreement to writing, the writing supersedes all other understandings or agreements between the parties on that subject.[51]

Parol evidence of fraud or mistake in respect to a written instrument is always admissible.[52]

A judgment not suspended by an appeal is evidence of the existence of facts found to exist by such judgment on the trial of a subsequent action between the same parties in interest and in which there were in issue the same facts, although the time to appeal from such former judgment had not expired.[53]

A different rule as to the admission of such judgment seems to have been declared by the Supreme Court in the estate of Blythe, 99 Cal. 472.

51. Smith v. Taylor, 82 Cal. 533; Beall v. Fisher, 95 Cal. 568.
52. Isenhoot v. Chamberlain, 59 Cal. 630.
53. Cook v. Rice, 91 Cal. 664.

CHAPTER XXVIII.

OF THE POSTPONEMENT OF TRIALS.

The clerk of a court must enter causes upon the calendar of the court according to the date of the issue.

Either party may bring an issue to trial or to a hearing, and in the absence of the adverse party, unless the court, for good cause shown, otherwise direct, may proceed with his case, and take a dismissal of the action or a verdict or judgment, as the case may require.[1]

A motion to postpone a trial on the ground of the absence of evidence, except by consent of the parties, can only be made upon an affidavit showing the materiality of the evidence expected to be obtained and that due diligence has been used to procure it.

A trial shall be postponed when it appears to the court that the attorney of record, a party to the action, or a principal witness, is actually engaged in attendance upon a session of the legislature of the state, as a member thereof. The court may require the moving party, where application is made on account of the absence of a material witness to state upon affidavit the evidence which he expects to obtain; and if the adverse party thereupon admits that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial must not be postponed.[2]

The party obtaining the postponement of a trial in a court of record, must, if required by the adverse party consent that the testimony of any witness of such adverse party, who is in attendance, be then taken by deposition before a judge or clerk of the court in which the case is pending, or before such notary public

1. Code of Civil Procedure, 593, 594.
2. Code of Civil Procedure, Sec. 595.

as the court may indicate which must accordingly be done; and the testimony so taken, may be read on the trial of the action, with the same effect and subject to the same objections as if the witness was produced.[3]

Trial courts usually have rules which prescribe the law and motion days of such courts, at which issues of law will be tried, and motions made; and which prescribe the times, when orders will be made setting for trial cases in which matters of fact are at issue.

The party who claims to be surprised must move for a continuance at the earliest practicable period.[4]

The pending of an action is good ground for the continuance of the trial of a later action between the same parties involving the same cause of action, until the former action is finally determined.[5]

The unexpected absence of counsel of a party to an action, by reason of sickness of members of his family is a good ground of continuance until the party, by reasonable diligence, could procure the services of other counsel.[6]

If an action be commenced in a state court to recover lands claimed under a patent from the United States and an action is pending in a federal court to have such patent declared fraudulent and to set the same aside, the state court is justified in making an order continuing the trial of the action in the state court for a reasonable time, to abide the determination of the suit in the federal court.[7]

A court should not proceed to try an action before the issues are fully made up.[8]

The court may deny an application for a continuance made on the ground of the absence of material witnesses, when the affidavit on which the application is based does not state the names of the witnesses, nor what the applicant expects to prove by them.[9]

The affidavit on an application for a continuance should show

3. Code of Civil Procedure, Sec. 596.
4. McLear v. Hapgood, 85 Cal. 557.
5. Brown v. Campbell, 100 Cal. 647.
6. Thompson v. Thornton, 41 Cal. 628.
7. Rose v. Superior Court, 65 Cal. 570.
8. Friedlander v. S. G. & S. M. Co., 61 Cal. 116.
9. Carey v. Petroleum Co., 33 Cal. 697.

the materiality of the evidence on account of the absence of which the application is made, and that due diligence has been used to obtain it.[10]

When the affidavit on which an application for a continuance on the ground of the absence of a witness, does not show where the witness is, nor that his testimony is procurable within a reasonable time, such application may be denied.[11]

If a witness be a non-resident of the county in which the action is tried, the promise of the witness to be present at the trial, is no excuse for a failure to take the deposition of such witness.[12]

When an application is made to a court or referee to postpone a trial, the payment of costs occasioned by the postponement may be imposed, in the discretion of the court or referee, as a condition of granting the continuance.[13]

It is the duty of a party to an action or his attorney, to watch the progress of an action to which he is a party.[14]

A party to an action has the right to be present at the trial of the action; and unless his absence is voluntary and negligent without reasonable excuse, a continuance should be granted to enable him to be present at the trial.[15]

10. Kern Valley Bank v. Chester, 55 Cal. 49; Storch v. McCain, 85 Cal. 304.
11. Harper v. Lamping, 33 Cal. 641.
12. Lightner v. Mensel, 35 Cal. 452.
13. Code of Civil Procedure, Sec. 1020; Baumberger v. Arff, 96 Cal. 261; Elzroth v. Ryan, 91 Cal. 588.
14. Elzroth v. Ryan, 91 Cal. 584.
15. Jaffe v. Lilienthal, 101 Cal. 175.

CHAPTER XXIX.

OF JUDGMENT BY DEFAULT.

In an action arising upon contract for the recovery of money or damages only, if no answer has been filed with the clerk of the court within the time specified in the summons or such further time as may have been granted, the clerk of the court, upon the application of the plaintiff, in case of a personal service of the summons, must enter the default of the defendant, and immediately thereafter enter judgment for the amount specified in the summons, including the costs against the defendant, or against one or more of several defendants, who have been personally served with the summons in an action against two or more defendants, who are jointly or severally liable on the contract.[1]

The clerk in entering such default and judgment exercises no judicial function, but acts merely in a ministerial capacity, and unless he confines himself strictly within the statute, his acts can have no binding force.[2]

In other actions, if no answer has been filed with the clerk of the court within the time specified in the summons or such further time as may have been granted, the clerk must, in case of personal service of the summons, enter the default of the defendant; and thereafter the plaintiff may apply, at the first, or any subsequent term of the court, for the relief demanded in the complaint. If the taking of an account, or the proof of any fact is necessary to enable the court to give judgment or to carry the judgment into effect, the court may take the account, or hear the proof; or may in its discretion order a reference for that purpose. And where the action is for the recovery of dam-

1. Code of Civil Procedure, Sec. 585.
2. Wilson v. Cleveland, 30 Cal. 198; Glidden v. Packard, 28 Cal. 650.
3. Code of Civil Procedure, Sec. 585, Sub. 2.

ages in whole or in part, the court may order the damages to be assessed by a jury, or if, to determine the amount of the damages, the examination of a long account be involved, may order a reference for that purpose.[3]

In actions where the service of the summons was by publication, the plaintiff upon the expiration of the time for answering, may, upon proof of the publication and that no answer has been filed, apply for judgment; and the court must, thereupon, require proof to be made of the demand mentioned in the complaint; and if the defendant be not a resident of the state, must require the plaintiff or his agent to be examined upon oath, respecting any payments that have been made to the plaintiff, or to anyone for his use, on account of such demand, and may render judgment for the amount which he is entitled to recover.[4]

A judgment on default for damages is erroneous, and will be reversed on an appeal, if no amount of damages, or a prayer for damages, be contained in the complaint.[5]

4. Code of Civil Procedure, Sec. 585, Sub. 3.
5. Pitts. Coal M. Co. v. Greenwood, 39 Cal. 71.

CHAPTER XXX.

OF TRIALS OF ISSUES OF LAW AND OF FACT BY THE COURT OR BY A REFEREE.

When an answer is filed in an action raising issues of questions of fact, such issues of fact must be tried and determined by a referee appointed by the court for that purpose, or by the court, or by a jury.

Issues of law must be tried by the court, unless it be referred by the court, by consent of the parties to a referee for that purpose.

A reference may be ordered upon the agreement of the parties, filed with the clerk, or entered in the minutes of the court;

1. To try any or all of the issues in the action or proceeding, whether of fact or of law, and to report a finding, and judgment thereon.

2. To ascertain a fact necessary to enable the court to determine an action or proceeding.

When parties do not consent to a reference, the court may, upon the application of either, or of its own motion, direct a reference in the following cases:

1. When the trial of an issue of fact requires the examination of a long account on either side, in which case the referee may be directed to hear and decide the whole issue, or report upon any specific question of fact involved therein;

2. When the taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect.

3. When a question of fact, other than upon the pleadings, arises upon motion, or otherwise, in any stage of the action.

4. When it is necessary for the information of the court in a special proceeding.

The reference may be ordered to any person or persons, not exceeding three, agreed upon by the parties, and if they do not so agree, then by the court without such agreement; the referees must be residents of the county in which the action or proceeding is triable, and against whom there is no legal objection, or the reference may be made to the court commissioner of the county in which the cause is pending.

Either of the parties to the action or proceeding may object to the appointment of any person as referee on the ground of relationship by consanguinity or affinity within the third degree to either party, or to the judge of the court in which the appointment is made, and on one or more of the grounds, which are grounds or a ground of challenge to a trial juror; and affidavits may be read and witnesses examined, as to such objections to a referee and then the court must rule on the objection.

The referee or referees or commissioner must report in writing to the court within twenty days after the testimony is closed; and the facts found and conclusions of law must be separately stated therein; the finding of the referee or commissioner upon the whole issue must stand as the finding of the court, and upon filing the findings with the clerk of the court, judgment may be entered thereupon in the same manner as if the action had been tried by the court. Such findings may be excepted to and reviewed in like manner as if made by the court. When the referee is to report the facts, the findings reported have the effect of a special verdict.

The court cannot, without the consent of parties in a common law action, refer the action to a referee, to state an account between the parties and report findings and a judgment in the action, since in such actions the parties are entitled to a trial by jury if they desire it.[1] But if no objection be taken to such order of reference, the order is not a ground for a reversal of the judgment in the case, on an appeal.[2]

A referee need not be sworn except in cases in which by statute he is required to be sworn.[3]

1. Grim v. Norris, 19 Cal. 142.
2. Hendy Machine W. v. Pac. C. C. Co., 99 Cal. 423.
3. Sloan v. Smith, 3 Cal. 407.

Under a reference to try the issue and report a judgment, a referee can exercise all the powers of a judge in relation to the trial of the cause referred to him.[4]

But since a judge before entering on the discharge of his duties as judge, is required to take an oath of office, it would be proper that a referee be sworn before entering upon the discharge of his duties as such referee.

The referee must be guided by the directions in the order of the court appointing him, and cannot act except within the directions contained in such order.[5]

The time within which a referee must file his report is simply directory and a finding of fact by a referee will not be set aside where the evidence is conflicting.[6]

If a trial of issues of fact be not referred to a referee, or to a commissioner of the court, it may, in all actions in equity, and in common law actions, in which a trial by jury is waived, be by the court.

Trial by jury in actions may be waived:

1. By failing to appear at the trial.

2. By written consent in person, or by attorney, filed with the clerk.

3. By failure to comply with the reasonable rules of a court in respect to the payment of jury fees.

4. By oral consent in open court entered in the minutes.

Upon the trial of questions of fact by the court, its decision must be given in writing and filed with the clerk within thirty days after the cause is submitted for decision; and in giving the decision, the facts found, and the conclusions of law must be separately stated; and judgment on the decision must be entered accordingly.

Findings of fact may be waived by the several parties:

1. By failing to appear at the trial;

2. By consent in writing filed with the clerk;

3. By oral consent in open court entered in the minutes of the court. On a judgment for the plaintiff upon an issue of law, he may proceed in the manner prescribed by the first two sub-

4. Plant v. Flemming, 20 Cal. 93.
5. Smith v. Walker, 38 Cal. 385.
6. Keller v. Sutrick, 22 Cal. 471.

divisions of section 585 of the Code of Civil Procedure upon the failure of the defendant to answer. If judgment be for the defendant upon an issue of law, and the taking of an account or the proof of any fact be necessary to enable the court to complete the judgment, a reference may be ordered as in that section provided.[7]

The failure of a party to an action to deposit jury fees as required by reasonable rules and orders of the court, is a waiver of the right of trial by jury.[8]

The court has the right, notwithstanding a waiver of the right of trial by a jury to direct that an issue of fact be tried by a jury.[9]

In an action in equity however, the verdict of a jury is advisory, and the court must find on the issues of fact so tried by a jury.

The provisions of the code that the court must file its written decision within thirty days after the submission of the case to the court for its decision is directory.[10]

If parties to an action go to trial without demanding a jury, the right to a jury trial is waived.[11]

In all common law actions, and in actions in which the right of trial jury is given by statute, a trial by jury must be had, unless such trial be waived.

The right of trial by jury guaranteed by the constitution refers to the right as it existed at common law.[12]

7. Code of Civil Procedure, 631, 636.
8. Conneau v. Geis, 73 Cal. 177; Adams v. Crawford, 116 Cal. 495.
9. Doll v. Anderson, 27 Cal. 251.
10. McLennan v. Bank of California, 87 Cal. 569.
11. Pfister v. Dascey, 65 Cal. 403; 67 Cal. 490.
12. People v. Powell, 87 Cal. 348.

CHAPTER XXXI.

OF A TRIAL BY JURY.

The right of trial by jury considered as an absolute right, does not extend to cases of equity jurisdiction.[1]

A jury within the meaning of the constitution must consist of twelve men.[2]

By the provisions of the constitution of California, in civil actions three-fourths of a jury may render a verdict. And a trial by jury may be waived, in criminal cases not amounting to a felony, by the consent of both parties expressed in open court, and in civil cases by the consent of the parties signified as prescribed by law; and in civil actions, and cases of misdemeanor, the jury may consist of twelve, or of any number less than twelve upon which the parties may agree in open court.[3]

At common law, a jury consisted of twelve persons, all of whom must have agreed upon a verdict before such verdict could be found.

A party to an action has the right to have the action tried by an impartial jury, but has not the right to have the action tried by any particular jurors.[4]

When an action is called for trial by a jury and no valid ground is shown for a continuance, the clerk must draw from the trial jury box of the court, the ballots containing the names of the jurors, until the jury is completed, or the ballots are exhausted.

Either party may challenge the jurors; but when there are several parties on either side, they must join in the challenge

1. Pacific Railway Company v. Wade, 91 Cal. 449.
2. People v. O'Neil, 48 Cal. 258.
3. California Constitution, Art. I., Sec. 7.
4. Asevada v. Orr, 100 Cal. 301; People v. Arceo, 32 Cal. 40.

before it can be made. The challenges to the individual jurors are either pre-emptory or for cause. Each party is entitled to four pre-emptory challenges. If no pre-emptory challenges are taken until the panel is full, they must be taken by the parties alternately commencing with the plaintiff.

Challenges for cause may be taken on one or more of the following grounds:

1. A want of any of the qualifications prescribed by statute to render a person competent as a juror;

2. Consanguinity or affinity within the fourth degree to any party;

3. Standing in the relation of guardian and ward, master and servant, employer and clerk, or principal and agent, to either party, or being a member of the family of either party, or a partner in business with either party; or surety on any bond or obligation for either party;

4. Having served as a juror, or been a witness on a previous trial between the same parties for the same cause of action;

5. Interest on the part of the juror in the event of the action, or in the main question involved in the action, except his interest as a member or citizen of a municipal corporation;

6. Having an unqualified opinion or belief as to the merits of the action, founded upon a knowledge of its material facts, or of some of them;

7. The existence of a state of mind on the part of the juror evincing enmity against or bias for or against either party. Challenges for cause must be tried by the court. The juror challenged and any other person may be examined as a witness on the trial of the challenge.

As soon as the jury is completed, the jurors must be sworn or affirmed in substance that they and each of them will well and truly try the matter in issue between the plaintiff, naming him, and the defendant, naming him, and a true verdict render according to the evidence.[5]

If before the jury is completed to try an action and the ballots in the trial jury box are exhausted, the court may by an order

5. Code of Civil Procedure, Secs. 600, 604.

entered in the minutes of the court, direct the sheriff, or if he be disqualified, the coroner of the county, and if he be disqualified, then an elisor chosen by the court, forthwith to summon a sufficient number of persons from the body of the county, or city and county, and not from the bystanders and having the qualifications of jurors, to complete the panel.

Neither the sheriff nor the coroner is qualified to serve such process if he is a party to the action, or if, by reason of bias or prejudice or other cause, he would not act promptly or impartially.[6]

At common law, if the sheriff or coroner be not indifferent persons, and are disqualified to summon a jury for a case, the venire is directed to two clerks of the court, or two persons of the county named by the court and sworn, who are called elisors and their return is final; no challenge being allowed to their array.[7]

Under the provisions of section 226 of the Code of Civil Procedure, the court may order a sufficient number of jurors to be drawn and summoned forthwith or the court may, by an order entered in its minutes direct the sheriff or an elisor chosen by the court, forthwith to summon so many good and lawful men of the county, or city and county, to serve as jurors, as may be required; and the persons so summoned, if qualified, will act as jurors.

When the jury has been sworn, the trial must proceed in the following order unless the court for special reasons otherwise directs.

The plaintiff after stating the issue and his case, must produce the evidence on his part.

The defendant may then open his defense, and offer his evidence in support thereof.

The parties may then respectively offer rebutting evidence only, unless the court for good reasons and in furtherance of justice, permit them to produce evidence upon their original case.

When the evidence is concluded, unless the case is submitted to the jury on either side, or on both sides, without argu-

6. Code of Civil Procedure, Sec. 227; Political Code, Secs. 4191, 4192.
7. 3 Bl. Com. 355.

ment, the plaintiff must commence and may conclude the argument.

If several defendants having separate defenses appear by different counsel, the court must determine their relative order in the evidence and argument, and after argument, or if there be no argument, the court may charge the jury.

In charging the jury, the court may state to them all matters of law, which it deems necessary for their information in giving their verdict; and if the court state the testimony in the case, it must inform the jury that they are the exclusive judges of all questions of fact. The court must furnish to either party, at the time, upon request, a statement in writing of the points of law contained in the charge, or sign at the time a statement of such points prepared and submitted by the counsel of either party.

When either party asks special instructions to be given to the jury, the court must either give such instructions, or refuse to do so, or give the instructions with a modification, in such a manner that it may distinctly appear what instructions were given in whole or in part.

When in the opinion of the court, it is proper for the jury to have a view of the property which is the subject of litigation, or the place in which any material fact occurred, it may order them to be conducted in a body, under the charge of an officer, to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent no person other than the person so appointed, shall speak to them on any subject connected with the trial.

If the jury are permitted to separate during the trial, they must be admonished by the court that it is their duty not to converse with, or suffer themselves to be addressed by, any other person, on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them.

Upon retiring for deliberation the jury may take with them all papers which have been received as evidence in the cause, except depositions, and copies of such papers as ought not in the opinion of the court, to be taken from persons having them in possession; and they may also take with them notes of the testi-

mony or other proceedings on the trial, taken by them, or any of them, but none taken by any other person.

When the case is finally submitted to the jury, they may decide in court, or retire for deliberation; if they retire, they must be kept together in some convenient place under the charge of an officer, until at least three-fourths of them agree upon a verdict or until they are discharged by the court. If three-fourths of them are unable to agree on a verdict, they may be discharged by the court.

Unless by order of the court, the officer having the jury in charge must not suffer any communication to be made to them, or make any himself, except to ask them if they, or three-fourths of them, have agreed upon a verdict; and he must not, before their verdict is rendered, communicate to any person the state of their deliberations, or the verdict agreed upon.

After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed on any point of law arising in the case, they may require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or notice to, the parties or counsel.

If, after impanelling the jury, and before the verdict a juror becomes sick so as to be unable to perform his duty, the court may order him to be discharged.

In that case the trial may proceed with the other jurors, with the consent of the parties to the action; or another juror may be sworn and the trial begin anew; or the jury may be discharged, and another jury impanelled.

In all cases where the jury are discharged, or prevented from giving a verdict by reason of accident or other cause during the progress of the trial, or after the cause has been submitted to them, the action may be again tried immediately, or at a future time as the court may direct.

While the jury are absent, the court may adjourn from time to time in respect to other business; but it is, nevertheless, open for every purpose connected with the cause submitted to the jury, until a verdict is rendered, or the jury discharged.

The court may direct the jury to bring in a sealed verdict, at the opening of the court, in case of an agreement, during a recess or adjournment of the court for the day.

When the jury, or three-fourths of them, have agreed upon a verdict, they must be conducted into court, their names called by the clerk, and the verdict rendered by their foreman; the verdict must be in writing signed by the foreman, and must be read by the clerk to the jury, and the inquiry made whether it is their verdict. Either party may require the jury to be polled, which is done by the court or clerk asking each juror if the verdict is his verdict; if upon such inquiry or polling, more than one-fourth of the jurors disagree thereto, the jury must be sent out again, but if no such disagreement be expressed, the verdict is complete and the jury discharged from the case.

When the verdict is announced, if it is informal or insufficient, in not covering the issue submitted, it may be corrected by the jury under the advice of the court, or the jury may again be sent out.

The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant; a special verdict is that by which the jury find the facts only, leaving the judgment to the court. The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and these conclusions of fact must be so presented, that nothing shall remain to the court, but to draw from them conclusions of law.

In an action for the recovery of money only, or specific real property, the jury in their discretion may render a general or special verdict. In all other cases, the court may direct the jury to find a special verdict in writing upon all or any of the issues, and in all cases may instruct them, if they render a general verdict, to find on particular questions of fact to be stated in writing, and may direct a written finding thereon. The special verdict or finding must be filed with the clerk and entered upon the minutes. When a special finding of facts is inconsistent with the general verdict, the former controls the latter and the court must give judgment accordingly.

When a verdict is found for the plaintiff in an action for the recovery of money, or for the defendant, when the counter claim for the recovery of money is established exceeding the amount of the plaintiff's claim as established, the jury must find the amount of the recovery.

In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant by his answer claim a return thereof, the jury, if their verdict be in favor of the plaintiff, or, if being in favor of the defendant, and they also find that he is entitled to a return thereof, must find the value of the property, and, if so instructed, the value of specific portions thereof, and may at the same time assess the damages, if any are claimed in the complaint or answer which the prevailing party has sustained by reason of the taking or detention of such property.

Upon receiving a verdict, an entry must be made by the clerk in the minutes of the court specifying the time of the trial, the names of the jurors and witnesses and setting out the verdict at length, and where a special verdict is found, either the judgment rendered thereon, or if the case be reserved for argument or further consideration, the order thus reserving it.[8]

The prevailing party must pay the jury fee; and he can include the amount of such fee in his memorandum of costs, if he be entitled to costs.

In case the jury be for any cause discharged without finding a verdict, the fees of the jury must be paid by the party who demanded the jury, but may be recovered as costs if he afterwards obtain judgment, provided he is entitled to costs.[9]

8. Code of Civil Procedure, Secs. 600, 628.
9. Statutes of 1871-2, p. 188.

CHAPTER XXXII.

OF JUDGMENTS.

A judgment is the final determination of the rights of the parties in an action or civil proceeding.[1]

A judgment in the Superior Court, is interlocutory, or final. An interlocutory judgment is a determination of the rights of parties first made, as in action for a dissolution of a partnership and for an accounting, and in an action for the partition of property; and an appeal from an interlocutory judgment is taken by an appeal from an interlocutory judgment from which an appeal can be taken.

While proceedings are pending for the review of a judgment, either on an appeal or on a motion for a new trial, or until the time to appeal has expired, the judgment is not a final determination of the rights of the parties, although it may be final for the purpose of an appeal.[2]

A judgment in a civil action is not final so long as the time for an appeal has not expired, nor during the pendency of such appeal, if taken;[3] and until it is final, it cannot be pleaded as a *bar* in a subsequent action involving the same matters;[4] nor can it be used as evidence in *bar* in another action for the same cause.[5]

An action is deemed to be pending from the time of its commencement until its final determination upon an appeal, or until the time for an appeal has passed unless the judgment is sooner satisfied.[6]

1. Code of Civil Procedure, Sec. 577.
2. Gillmore v. American C. I. Co., 65 Cal. 63.
3. Story v. Story and Isham C. Co., 100 Cal. 41.
4. Brown v. Campbell, 100 Cal. 636.
5. Harris v. Barnhart, 97 Cal. 546.
6. Code of Civil Procedure, Sec. 1049.

A judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between themselves.[7]

In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, when a several judgment is proper.[8]

The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case the court may grant him any relief consistent with the case made by the complaint, and embraced in the issue.[9]

An action may be dismissed or judgment of non suit entered by the plaintiff before trial, by a written request to the clerk, upon payment of costs, provided a counter claim has not been made, or affirmative relief has not been sought by a counter claim or answer of the defendant. On such dismissal, if a provisional remedy has been allowed, the undertaking must be delivered by the clerk to the defendant, who may have his action thereon; by either party upon the written consent of the other; by the court, when the plaintiff fails to appear on the trial and the defendant appears and asks for the dismissal; by the court, when upon the trial and before the final submission of the case the plaintiff abandons it; by the court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury; by the court, when after the verdict, or final submission, the party entitled to judgment neglects to demand and have the same entered for more than six months; and by the court, unless summons shall have been issued within one year, or unless the summons shall have been served and a return thereon made within three years after the commencement of the action, unless an appearance has been made by the defendant or defendants,

7. Code of Civil Procedure, Sec. 578.
8. Code of Civil Procedure, Sec. 579.
9. Code of Civil Procedure, Sec. 580.

within the said three years, in the same manner as if summons had been issued and served.[10]

The plaintiff in an action has the absolute right to take a judgment of non suit before the case has been submitted to the jury, but after such submission and the jury has retired, the plaintiff has not such absolute right.[11]

When the evidence would not authorize the jury to find a verdict for the plaintiff, the court should non suit the plaintiff if the defendant moves the court for such non suit; and the court can grant a non suit after the evidence on both sides has been heard.[12]

In every case other than those mentioned in said section 581, judgment must be rendered on the merits.

A judgment of dismissal of an action by the court pursuant to an agreement of the parties made in open court, either in writing or entered in the minutes of the court, amounts to an open and voluntary renunciation of a suit pending, and operates as a retraxit, and is a bar to any other suit between the same parties on the identical cause of action thus adjusted by the parties if by such agreement and judgment the defendant is to pay any costs of the action.[13]

When a complaint states a cause of action and the answer does not deny the material allegations thereof and fails to present new matter to bar or defeat the action, judgment should be rendered on the pleadings on a motion therefor by the plaintiff.[14]

Such motion, however, should not be granted when there is any material issue of fact presented by the answer.[15]

Judgment should not be rendered on the pleadings on the motion of the plaintiff if the answer contains a denial of the material allegations of the complaint, even if the answer sets up a specific defense separately stated, which admits the allegations denied.[16]

If a complaint does not state a cause of action, the defendant

10. Code of Civil Procedure, Sec. 581.
11. Brown v. Harter, 18 Cal. 76.
12. Geary v. Simmons, 39 Cal. 224; Vanderford v. Foster, 65 Cal. 49.
13. Merritt v. Campbell, 47 Cal. 543.
14. San Francisco v. Staude, 92 Cal. 561.
15. Widman v. Martin, 87 Cal. 88.
16. Amador County v. Butterfield, 51 Cal. 526.

on motion is entitled to a judgment in his favor on the pleadings.[17]

Amendments to pleadings may be allowed by the court after a motion for judgment on the pleadings has been made.[18]

It is the duty of the clerk of the court to enter judgment in conformity to the verdict of the jury within twenty-four hours after the rendition of such verdict, unless the court order the case to be reserved for argument, or further consideration, or grant a stay of proceedings.[19] If the clerk should neglect to perform this duty, the court can direct him to do it, and the party entitled to have such judgment entered is not to suffer loss by reason of the failure of the clerk to perform such duty.[20]

If the answer of defendant present an issue in abatement of the action, and such issue is found in favor of the defendant, the judgment thereon should be that the action abate, and the judgment should not be in form a final judgment in bar.[21]

When the case is reserved for argument or further consideration, it may be brought by either party before the court for argument.[22]

If a counter claim established at the trial exceed the plaintiff's demand, judgment for the defendant may be given for the excess, or if it appear that the defendant is entitled to any other affirmative relief, judgment must be given accordingly.[23]

In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or the value thereof, in case a delivery cannot be had, and damages for the detention. If the property has been delivered to the plaintiff and the defendant claim a return thereof, judgment for the defendant may be for return of the property, or the value thereof, in case a return cannot be had, and damages for taking and withholding the same. In an action on a contract or obligation in writing for the direct payment of money, and in all actions for the recovery of money in which it is alleged that it was understood

17. De Toro v. Robinson, 91 Cal. 371.
18. Raker v. Bucher, 100 Cal. 214; Kelley v. Kriess, 68 Cal. 211.
19. Code of Civil Procedure, Sec. 664.
20. Casement v. Ringgold, 28 Cal. 339, 340.
21. Larco v. Clements, 36 Cal. 132.
22. Code of Civil Procedure, Sec. 665.
23. Code of Civil Procedure, Sec. 666.

and agreed by the respective parties, that the payment was to be in a specific kind of money or currency, and such fact be admitted by the default of the defendant or established by evidence, the judgment for the plaintiff must be made payable in the kind of money or currency so alleged in the complaint; and in an action against any person for the recovery of money received by such person in a fiduciary capacity, or to the use of another, judgment for the plaintiff must be payable in the kind of money or currency so received by such person.[24]

A judgment cannot be rendered in favor of the plaintiff in an action of replevin or claim and delivery unless the defendant was in possession of the property at the commencement of the action. If the defendant has disposed of the property before the commencement of the action, the action should be against such defendant for damages for the conversion of the property.[25]

In New York an action to recover possession of personal property can be maintained against a defendant who had parted with such possession before the commencement of the action.

In that action, however, the person who was in actual possession of the property was joined as a defendant in the action.[26]

It is the duty of the clerk to keep as a record of the court a book called the judgment book, in which judgments must be entered.[27]

Immediately after entering the judgment the clerk must make up and file a judgment roll consisting, when the summons has been personally served and when the complaint is not answered by any defendant of the summons, with the affidavit or proof of service, the complaint, with a memorandum indorsed thereon that the default of the defendant for not answering was entered, and a copy of the judgment; and in case where the service of the summons be by publication, the affidavit for publication of summons, and the order directing the publication of summons must also be included.

In all other cases such judgment roll must consist of the pleadings in the action, a copy of the verdict of the jury or find-

24. Code of Civil Procedure, Sec. 667.
25. Riciotto v. Clements, 94 Cal. 105.
26. Nichols v. Michael, 80 Am. Dec. 259.
27. Code of Civil Procedure, Sec. 668.

ings of the court, or referee, all bills of exception taken and filed and a copy of any order made on demurrer or in relation to the change of parties, and a copy of the judgment; if there are two or more defendants in the action, and any one of them has allowed judgment to pass against him by default, the summons, with proof of its service on such defendant, must also be added; and if the service on such defaulting defendant be by publication, then the affidavit for publication and the order directing the publication of the summons must also be included.[28]

If a party die after verdict or decision upon any issue of fact, and before judgment, the court may nevertheless render judgment thereon.

Such judgment is not a lien on the real property of the deceased party, but is payable in the course of the administration of his estate.[29]

A judgment in favor of a dead man is a nullity.[30]

But a judgment rendered against a party to an action after his death is not void on its face, but may be set aside on proper proceedings for that purpose.[31]

It is the duty in California of the clerk of the court to keep as a record of his office a book of the dockets of judgments and to make the entries in this docket as required by sections 671 and 672 of the Code of Civil Procedure of that state, and from the time a judgment is so docketed it becomes a lien upon all the real property of the judgment debtor not exempt from execution in the county, owned by him at the time, or which he may afterwards acquire until the lien ceases.

Such lien continues for five years unless the enforcement of the judgment be stayed on appeal by the execution of a sufficient undertaking on such appeal, in which case the lien of the judgment, and any lien by virtue of an attachment that has been issued and levied in the action ceases.[32]

A transcript of the original docket certified by the clerk may be filed with the recorder of any other county, and from the time of the filing the judgment becomes a lien upon all the real prop-

28. Code of Civil Procedure, Sec. 670, as amended in 1895.
29. Code of Civil Procedure, Sec. 669.
30. McCreery v. Everding, 44 Cal. 284.
31. Elliott v. Paterson, judge, 65 Cal. 109.
32. Code of Civil Procedure, Sec. 671.

erty of the judgment debtor not exempt from execution in such county, owned by him at the time, or which he may afterwards and before the lien expires, acquire.

Such lien continues for two years unless the judgment be previously satisfied.[33]

When an action or proceeding affecting the title to, or possession of real estate is transferred to any court in a county other than the county in which the real estate or some portion of it is situated, the clerk of such court must, after final judgment therein, certify under his seal of office, and transmit to the corresponding court of the county in which the real estate affected by the action is situated, a copy of the judgment. The clerk receiving such copy must file, docket and record the judgment in the records of the court, briefly designating it as a judgment transferred from court (naming the proper court).[34]

Judgment affecting the title to, or the possession of real property, properly authenticated by the certificate of the clerk of the court in which such judgment was rendered, may be recorded without acknowledgment, certificate of acknowledgment or further proof.[35]

Satisfaction of a judgment may be entered in the clerk's docket on an execution returned satisfied, or upon an acknowledgment of satisfaction filed with the clerk made in the manner of an acknowledgment of a conveyance of real property by the judgment debtor, or by his endorsement on the face of, or on the margin of the record of the judgment, or by such acknowledgment or endorsement by his attorney, unless a revocation of his authority is filed; whenever a judgment is satisfied in fact, otherwise than upon an execution, the party or attorney must give such acknowledgment or make such indorsement, and upon motion the court may compel it, or may order the entry of satisfaction without.[36]

The enforcement of a judgment does not depend on its entry or docketing.[37]

33. Code of Civil Procedure, Sec. 674.
34. Code of Civil Procedure, Sec. 400.
35. Civil Code, Sec. 1159.
36. Code of Civil Procedure, Sec. 675.
37. Los Angeles County Bank v. Raynor, 61 Cal. 145; Hastings v. Cunningham, 39 Cal. 137.

It is generally the usage of courts on or after rendering judgments, unless it appear that a stay of process to enforce such judgment would cause injury to a party to the action, to grant, on an application therefor, an order staying such process for a reasonable time fixed in the order.

CHAPTER XXXIII.

OF COSTS AND DISBURSEMENTS, AND OF TENDER.

Costs are allowed, of course, to the plaintiff upon a judgment in his favor, in the following cases, namely: in action for the recovery of real property; in an action to recover the possession of personal property where the value of the property as found on the trial amounts to $300 or more; in an action for the recovery of money or damages when the plaintiff recovers $300 or more; in special proceedings; in an action which involves the title of or possession of real estate, or the legality of any tax, impost, assessment, toll or municipal fine.

Costs may be allowed to the defendant upon judgment in his favor in such actions, and in special proceedings.[1]

But neither party is entitled to costs under the provisions of sections 1022, 1024 of the Code of Civil Procedure, unless costs are allowed by those sections.[2]

When several actions are brought on one bond, undertaking, bill of exchange or other instrument in writing, or in any other case for the same cause of action against several parties who might have been joined as defendants in the same action, no costs can be allowed to the plaintiff in more than one of such actions, which may be at his election, if the party proceeded against in the other actions were at the commencement of the previous action openly within this state; but the disbursements of the plaintiff must be allowed to him in each action.[3]

In other actions than those mentioned in sections 1022 and 1024 of the Code of Civil Procedure, costs may be allowed or not, and if allowed may be apportioned between the parties on the same or adverse sides in the discretion of the court; but no costs

1. Code of Civil Procedure, Secs. 1022, 1024.
2. Anthony v. Grand, 101 Cal. 235.
3. Code of Civil Procedure, Sec. 1023.

can be allowed in an action for the recovery of money or damages when the plaintiff recovers less than three hundred dollars, nor in an action to recover the possession of personal property when the value of the property is less than three hundred dollars.[4] When there are several defendants in the action mentioned in said section 1022 not united in interest and making separate defenses by separate answers, and the plaintiff fails to recover judgment against all, the court must award costs to such of the defendants as have judgment in their favor.[5]

The fees of referees except those of referees in partition suits, are five dollars to each for every day spent in the business of reference; but the parties may agree in writing upon any other rate of compensation, and thereupon such rate shall be allowed.[6]

The fees of referees in partition suits are fixed by the court in its discretion.[7]

When in an action for the recovery of money only, the defendant alleges in his answer that before the commencement of the action he tendered to the plaintiff the full amount to which he was entitled, and thereupon deposits in court for plaintiff the full amount so tendered, and the allegation is found to be true, the plaintiff cannot recover costs but must pay costs to the defendant.[8]

The person to whom a tender is made must at the time specify any objection he may have to the money, instrument or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount, or kind of property, he must specify the amount, terms or kind which he requires, or be precluded from objecting afterwards.[9]

At common law the party making a tender of money must have the money at hand immediately under his control, and must there and then not only be ready and willing, but must produce and offer to pay it to the other party on the performance by him of the requisite condition.[10]

4. Code of Civil Procedure, Sec. 1025.
5. Code of Civil Procedure, Sec. 1026.
6. Code of Civil Procedure, Sec. 1028.
7. Code of Civil Procedure, Sec. 768.
8. Code of Civil Procedure, Sec. 1030.
9. Code of Civil Procedure, Sec. 2076.
10. Englander v. Rogers, 41 Cal. 422.

In California the party making a tender is entitled to a receipt for the money or thing tendered, and may demand a proper signature to such receipt of the party to whom the tender is made as a condition of the payment or delivery,[11] and an offer in writing to pay a particular sum of money or to deliver a written instrument, or specific personal property, is, if not accepted, equivalent to the actual production and tender of the money, instrument or property.[12] An offer of performance, however, is of no effect, if the person making it is not able and willing to perform according to the offer.[13] The thing to be delivered, if any, need not in any case be actually produced upon an offer of performance unless the offer is accepted.[14]

Under the provisions of the California codes the money or thing tendered need not be produced unless the offer or tender is accepted.[15]

A tender of the principal sum due with the stipulated interest up to the time of the tender, puts a stop to the accruing of interest from the date of the tender.[16]

When the tender is made of the full amount due before suit is brought, and the tender is kept good and the money tendered is brought into court, the judgment should be for the plaintiff for the amount tendered and for the defendant for his costs.[17]

In an action prosecuted or defended by an executor, administrator or trustee of an express trust, or a person expressly authorized by statute, costs may be recovered as in an action by and against a person prosecuting or defending in his own right; but such costs must by the judgment be made chargeable only upon the estate, fund or party represented, unless the court directs the same to be paid by the plaintiff or defendant personally for mismanagement or bad faith in the action or defense.[18]

When a judgment is recovered with costs against any executor or administrator, he shall be individually liable for such

11. Code of Civil Procedure, Sec. 2075; Civil Code, Sec. 1499.
12. Code of Civil Procedure, Sec. 2074.
13. Civil Code, Sec. 1495.
14. Civil Code, Sec. 1496.
15. Peckham v. Stewart, 97 Cal. 152.
16. Patterson v. Sharp, 41 Cal. 135.
17. Curiac v. Abadie, 25 Cal. 502.
18. Code of Civil Procedure, Sec. 1031.

costs, but they must be allowed him in his administration accounts, unless it appears that the suit or proceeding in which the costs were taxed was prosecuted or defended without just cause.[19]

When the decision of a court of inferior jurisdiction in a special proceeding is brought before a court of higher jurisdiction for a review, in any other way than by an appeal, the same costs must be allowed as in cases on appeal, and may be collected by execution, or in such manner as the court may direct, according to the nature of the case.[20]

The party in whose favor judgment is rendered, and who claims his costs, must deliver to the clerk and serve upon the adverse party within five days after the verdict, or notice of the decision of the court or referee, or if the entry of the judgment on the verdict or decision be stayed, then before the entry is made—a memorandum of the items of his costs and necessary disbursements in the action or proceeding, which memorandum must be verified by the oath of the party, or his attorney or agent, or by the clerk of his attorney, stating that, to the best of his knowledge and belief the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding.

A party dissatisfied with the costs claimed may, within five days after notice of the filing of the bill of costs, file a motion to have the same taxed by the court in which the judgment was rendered, or by the judge thereof at chambers.[21]

The word decision in this section means findings of the court filed with the clerk, if there are findings,[22] and the notice of the decision mentioned in this section, so far as it applies to the time within which the memorandum of costs is to be filed, is the same in effect as knowledge of the decision, and the memorandum of costs must be filed within five days after the party entitled to costs has such knowledge.[23]

19. Code of Civil Procedure, Sec. 1509.
20. Code of Civil Procedure, Sec. 1032.
21. Code of Civil Procedure, Sec. 1033.
22. Porter v. Hopkins, 63 Cal. 53.
23. Mullaly v. Irish American B. Society, 69 Cal. 559; O'Neil v. Donahue, 57 Cal. 231: Dow v. Ross, 90 Cal. 562.

A memorandum of costs filed before the filing of the findings in a case, if such findings are filed, should be stricken out.[24]

The court may in its discretion allow the bill of costs and the affidavit thereto, to be amended after the time for filing has expired.[25]

The affidavit to the bill of costs, if correctly made, should, unless controverted, control the decision of the court in taxing the costs.[26]

But unless charges for the disbursements in a bill of costs appear upon their face to be for proper and necessary disbursements, there should be evidence, in addition to the verification of the bill of costs, that such disbursements were proper and necessary.[27]

The expenses of the sheriff, for keeper's fees incurred under a writ of attachment, must be included in the bill of costs.[28] In proceedings to condemn land, if a defendant obtains a new trial, and on such trial is awarded a less sum than was awarded on the first trial, the plaintiff in the proceedings shall recover costs of the second trial against the defendant.[29]

The affidavit to the bill of costs may be made by any attorney for the prevailing party on the trial of the case, although such attorney was not an attorney of record of the prevailing party.[30]

If a transcript of the reporter's notes be ordered by the court to be written out, the prevailing party is entitled to recover as costs the portion of the expenses of making such transcript which he has paid, but he is not entitled as costs of the action to the expenses of writing such transcript unless the same was written out on an order of the court.[31]

The costs of an appeal to the Supreme Court are in the discretion of the Supreme Court when a new trial is ordered or the judgment is modified.[32]

24. Sellick v. De Carlow, 95 Cal. 644.
25. Burnham v. Hays, 3 Cal. 115, cited 92 Cal, 201.
26. Barnhart v. Kron, 88 Cal. 447.
27. Miller v. Highland Ditch Co., 91 Cal. 103.
28. Hotchkiss v. Smith, 108 Cal. 285.
29. Code of Civil Procedure, Sec. 1254; Los A. P. & G. R. Co. v. Rumpp, 104 Cal. 20.
30. Yorba v. Dobner, 90 Cal. 337.
31. Barkly v. Copeland, 86 Cal. 493.
32. Code of Civil Procedure, Sec. 1027.

Whenever costs are awarded to a party by an appellate court, if he claims such costs, he must within thirty days after the remittitur is filed with the clerk of the court below, deliver to such clerk a memorandum of his costs verified as prescribed by section 1033 of the Code of Civil Procedure, and thereafter he may have execution therefor as upon a judgment.[33]

Costs in an action upon an appeal are the costs in the Supreme Court, and the costs of making up the appeal in the court below, including the costs of making out the transcript.[34] The fees of the clerk of the Supreme Court are stated in the rules of that court. When the transcript on the appeal is unnecessarily voluminous, the appellant may not be allowed costs on the appeal.[35]

The party who caused the transcript on appeal to be unnecessarily long will be adjudged to pay the costs of the printing thus unnecessarily incurred.[36]

The clerk must include in the judgment entered up by him any interest on the verdict or decision of the court from the time it was rendered or made, and the costs, if the same have been taxed or ascertained; and he must, within two days after the same are taxed and ascertained, if not included in the judgment, insert the same in a blank left in the judgment for that purpose, and must make a similar insertion of the costs in the copies and docket of the judgment.[37]

Security for the costs and charges in an action which may be awarded against a non-resident plaintiff, may be required by the defendant; and when so required all proceedings in the action must be stayed until an undertaking executed by two or more persons is filed with the clerk to the effect that they will pay such costs and charges as may be awarded against the plaintiff by judgment or in the progress of the action, not exceeding the sum of three hundred dollars.

A new or additional undertaking may be ordered by the court or judge upon proof that the original undertaking is insuf-

33. Code of Civil Procedure, Sec. 1034.
34. Gray v. Gray, 11 Cal. 341.
35. Bullard v. His Creditors, 56 Cal. 606.
36. Budd v. Holden, 28 Cal. 124.
37. Code of Civil Procedure, Sec. 1035.

ficient security, and proceedings in the action stayed until such new or additional undertaking is executed and filed.

If no undertaking as such security has been filed within thirty days from the service of notice that such security is required, or of an order for new or additional security, upon proof of such fact, the court or judge may order the action to be dismissed.[38]

38. Code of Civil Procedure, Secs. 1086, 1087.

CHAPTER XXXIV.

OF THE ENFORCEMENT OF JUDGMENTS.

After judgment is rendered the party in whose favor it is rendered, is, unless proceedings to enforce such judgment be stayed, entitled to an execution or to other proceedings for the enforcement of the judgment.

In common law actions such successful party is entitled at any time within five years after the judgment is given, to have an execution issued.[1]

In actions in equity in which the judgment cannot be enforced by a writ of execution, a certified copy of the judgment may be served upon the party against whom the same is rendered, or upon the person or officer required thereby, or by law, to obey the same and obedience thereto may be enforced by the court.[2]

Obedience to such judgment may be enforced under proceedings for punishment for a contempt of the authority of the court.[3]

There are cases, however, in which the person who is to obey the commands of such judgment cannot be served with a certified copy of such judgment.

A court of equity will always find means of enforcing its decrees against a delinquent defendant; and its powers in this respect is as extensive as the exigencies of the case.[4]

A court of equity may decree that a conveyance of real estate be made by a defendant, and in default of such conveyance being made the court may appoint a commissioner to execute such conveyance.[5]

1. Code of Civil Procedure, Sec. 681.
2. Code of Civil Procedure, Sec. 684, last clause of section.
3. Code of Civil Procedure, Sec. 1209, 1219.
4. Wickersham v. Crittenden, 93 Cal. 33.
5. McGee v. Sweeny, 84 Cal. 100.

The power of a court to have issued a writ of assistance rests upon the obvious principle that the power of a court to afford a remedy must be co-extensive with its jurisdiction over the subject matter. When the court possesses jurisdiction to make a decree, it possesses the power to enforce its execution.[6]

In California a person who is dispossessed of real property by the judgment or process of a court of competent jurisdiction, and who has not the right so to do, enters upon or takes possession of such property, or induces another person to do so, without legal right, is guilty of a contempt of the court rendering such judgment or issuing such process, and upon conviction for such contempt the court must immediately issue an alias process, directed to the proper officer requiring him to restore possession to the person entitled to such possession under the original judgment or process (or to his lessor or to his grantor).[7]

The person who was dispossessed of real property if an event which occurred subsequent to the judgment under which he was dispossessed, and before his re-entry on the property, confers on him the right of possession, is not guilty of a contempt by reason of such re-entry.[8]

In California in all cases the judgment may be enforced or carried into execution after the lapse of five years from the day of its entry, by leave of the court, upon motion, or by judgment for that purpose founded on supplemental pleadings; but nothing in the provisions of section 685 of the Code of Civil Procedure of that state as amended in 1895 shall be construed to revive a judgment for the recovery of money which shall have been barred by limitation at the time of the passage of the act amending that section, approved March 9th, 1895.[9]

Upon the application of the executor or administrator of a judgment creditor, or his successor in interest, execution may be issued to enforce a judgment rendered in favor of the judgment creditor in his lifetime; and if a judgment be rendered in his lifetime against a judgment debtor for the recovery of real

6. Montgomery v. Tutt, 11 Cal. 192, 193.
7. Code of Civil Procedure, Sec. 1210.
8. Mahoney v. Van Winkle, 33 Cal. 448; Larrabee v. Selby, 52 Cal. 506.
9. Code of Civil Procedure, Sec. 685.

or personal property, or for the enforcement of a lien thereon, such judgment may be enforced after his death.[10]

The statutes of California are very full in their provisions respecting the issuance of executions, their contents, what may be levied on under such execution, how the levies and sales thereunder shall be made, and in respect to property exempt from execution, and the redemption of real estate, sold under execution from the sale.[11]

The provisions of 702 and 703 of the Code of Civil Procedure in respect to the redemption of real property from sales under execution were amended March 27th, 1895, and were again amended February 26th, 1897.

Neither of such amendments, however, so far as the same relates to the time and terms of such redemption applies to sales under execution to enforce a judgment for an indebtedness contracted before the passage of such amendments.[a]

Prior to the passage of the act of 1895 amending section 685 of the Code of Civil Procedure, relating to the enforcing of a judgment after the lapse of five years from the date of the entry of the judgment, a judgment for the recovery of money could not be enforced after such lapse of five years from the entry of the judgment.[12]

An execution which is not void but voidable only cannot be attacked collaterally.[13]

A justice has power to recall an execution issued by him on a void judgment, and stay further proceedings, even if the judgment has been docketed in the office of the county clerk and the execution has been issued by the clerk.[14]

A motion for an order of court recalling an execution is a new proceeding and may be made by any attorney employed by a party for the purpose of making such motion,[15] and if the execution was improperly issued the motion should be granted[15] (same case), and the sheriff ordered to refund any money collected by him thereon.[16]

10. Code of Civil Procedure, Sec. 686.
11. Code of Civil Procedure, Secs. 681, 707.
a. Barnitz v. Beverty, 163 U. S. 118.
12. Dorland v. Smith, 93 Cal. 120.
13. Hunt v. Loucks, 38 Cal. 372.
14. Gates v. Lane, 49 Cal. 266.
15. Buell v. Buell, 92 Cal. 393.
16. McMann v. Superior Court, 74 Cal. 106.

The defendant in the execution in a proper case may move the court issuing the writ to quash the writ and need not go into equity for relief.[17]

The levy of an execution on real property when there is no lien on the property by attachment or judgment, fixes the commencement of the title under a sheriff's deed on a sale under such execution. The validity of the purchasers' title under such sale depends on the judgment, the execution and sale, and is unaffected by the failure of the officer to make a seizure of the land in the mode, or to advertise the land for sale, as required by the law.[18]

When a judgment is rendered and becomes a lien upon real property attached in the same action, the lien of the attachment is merged in the lien of the judgment, and has no effect except to confer priority in the lien of the judgment, and a levy of an execution issued in the action does not extend the time of the lien of such judgment nor create a new lien.[19]

A judgment cannot be levied on and sold under an execution.[20]

A franchise cannot be levied upon or sold under execution in the absence of a statutory provision therefor; and whenever such provisions exist, the extent as well as the mode of levy and sale are limited thereby.[21]

A sale of real property under an execution to enforce a judgment in an action, and the real property had been attached under a writ of attachment issued in the same action, relates back to the commencement of the attachment lien.[22]

A sale of real property in a county under an execution to enforce a judgment rendered in a justice's court in such county against the execution debtor, can be made by a constable of the county, and the filing of an abstract of such judgment in the office of the county clerk of the county is not essential to the validity of such sale.[23]

17. Domec v. Stearns, 30 Cal. 114.
18. Blood v. Light, 38 Cal. 649.
19. Bagley v. Ward, 37 Cal. 122.
20. Latham v. Blake, 77 Cal. 646.
21. Gregory v. Blanchard, 98 Cal. 311
22. Godfrey v. Monroe, 101 Cal. 224.
23. Campbell v. Wickware, 19 Cal. 145.

Partnership property can be levied on and taken possession by a sheriff under an execution against one of the partners, and the interest of that partner in such property can be sold, and the entire partnership property can be delivered to the purchaser on such sale, who thereby becomes a tenant in common of such property with the other persons who comprised such partnership firm, and the interest of the purchaser in the property can only be determined on an adjustment of the partnership accounts.[24]

As to third persons, there can be no valid levy on property under a writ of attachment when the officer does not know the subject of the levy, but merely stands at the door of a store which is locked and keeps others out, and thus attempts to make a levy on the goods in the store; such levy may be good as against the defendant in the writ.[25]

An undertaking executed to a sheriff as a condition upon which he would release property from an attachment levied thereon when a part of such property was exempt from such execution, and the sheriff knew this, and the defendant in the writ claimed such property as exempt and demanded such release, is void.[26]

When an execution is levied by a sheriff on personal property he could formerly sell the property under the writ after the expiration of his term of office; real property so levied on may be sold by his successor in office.[27] Under the provisions of the county government act of California, passed in 1897, the successor in office of a sheriff must execute a process not fully executed by a sheriff during his term of office.

Property levied on by a sheriff before the return day of a writ of execution against the property generally of the judgment debtor subject to be levied on, may be sold by the sheriff after such return day; and if there be a writ for the sale of specific property described in the writ and no levy be required, the sale may also be made after the return day of the writ.[28]

24. Wright v. Ward, 65 Cal. 526.
25. Tafts v. Manlove, 14 Cal. 47.
26. Servanti v. Lusk, 43 Cal. 238.
27. Clark v. Sawyer, 48 Cal. 133.
28. Southern California L. Co. v. Hotel Co., 94 Cal. 217.

A failure to give a proper notice of the sale of real estate does not invalidate the sale.[29]

A sale under an execution to enforce a valid unreversed judgment, though it be an erroneous judgment, is valid as against a collateral attack.[30]

Unless a sale under execution be supported by a then valid unreversed and unsatisfied judgment, it is void.[31]

The sheriff in making sale of property under process of the court, acts under a power, and if the power does not exist, no title passes.[32]

While proceedings to enforce a judgment are suspended on an appeal by an undertaking sufficient to stay such proceedings, the sheriff would have no power to enforce such judgment by a sale of property under an execution against the judgment debtor.

When distinct parcels of real property are first offered for sale separately on a sale under execution, and no bids are received, the real property may be sold en masse. If a sale of the real property of the execution debtor be made en masse without first offering distinct parcels of the property for sale separately, the sale may be set aside on motion, if such motion be made within a reasonable time.[33]

The judgment debtor may waive his statutory right to have his real property offered for sale in separate parcels, and before a sale of such property en masse will be set aside it must be shown that a sale of the property in separate parcels would have been more advantageous to the judgment debtor than was a sale of the property en masse.[34]

A sheriff's certificate of sale of land given under a valid execution sale thereof, gives the execution purchaser a conditional equitable estate in the land, which becomes a perfect equity upon the expiration of the time allowed by law for redemption.[35]

An attachment lien on land which was sold and conveyed after the attachment to a third person by the attachment debtor

29. Frink v. Roe, 70 Cal. 296.
30. Moon v. Martin, 88 Cal. 428.
31. Reynolds v. Lincoln, 71 Cal. 183; Bullard v. McArdle, 98 Cal. 355.
32. Bullard v. McArdle, 98 Cal. 358, 355.
33. Marston v. White, 91 Cal. 40.
34. Hudepohl v. Liberty H. W. etc. Co., 94 Cal. 588.
35. Leonard v. Flynn, 89 Cal. 543.

erty sold, or on some share or part thereof, subsequent to that on which the property was sold.

If the redemption be made by the judgment debtor or his successor in interest, he is entitled to receive from the person having the sheriff's certificate of purchase a certificate of such redemption properly acknowledged; this acknowledgment must be made and certified so that it can be properly recorded. If the redemption be made by a person having a lien on the property, and no further redemption be made within the time prescribed by statute, the person having such lien and who made such redemption is entitled to a deed from the sheriff making the sale of the property so sold. The manner of making the redemption of real property sold at sheriff's sale is clearly shown by statute;[47] and the provision of the statute law in respect to redemption must be strictly complied with.[48] But this case of Haskell v. Manlove, was decided before the adoption of the California codes. *It* is provided in section 4 of the Code of Civil Procedure that the provisions of that code and all proceedings under it are *to be* liberally construed with a view to effect its objects and promote justice.

The right to recover rents and profits of the land sold by a sheriff under execution between the time of such sale and the sheriff's deed for the land is a right given by statute, and such rents and profits cannot be recovered by the person receiving the sheriff's deed for the land, *by reason* of his title to the land under such deed.[49]

It is provided in section 708 of the Code of Civil Procedure that if the purchaser of real property sold on execution or his successor in interest be evicted therefrom in consequence of irregularities in the proceedings concerning the sale, or of the reversal or discharge of the judgment, he may recover the price paid with interest from the judgment creditor; and if the purchaser of property at sheriff's sale, or his successor in interest fail *to* recover possession in consequence of irregularity in the proceedings concerning the sale, or because the property sold was *not* subject to execution and sale, the court having jurisdiction

47. Code of Civil Procedure, Sec. 701, 705.
48. Haskell v. Manlove, 14 Cal. 54.
49. Henry v. Everts, 30 Cal. 425.

thereof must, after notice, and on motion of such party in interest or his attorney, revive the original judgment in the name of the petitioner for the amount paid by such purchaser at the sale with interest thereon from the time of payment, at the same rate the original judgment bore; and that the judgment so revived has the same force and effect as would an original judgment at the date of the revival and no more.

If a judgment be not void, but is voidable merely, a purchaser of real property in good faith at a sheriff's sale under the judgment, if not a party to the action, or the assignee of the judgment from such party, is protected in his purchase notwithstanding a reversal of the judgment, but if such purchaser be a party to the action, or is an assignee of the judgment, the judgment debtor may, at his election, either have the sale set aside and be restored to the possession, or have his action for damages.[50]

It is provided in section 709 of the Code of Civil Procedure that when property liable to execution against several persons is sold thereon, and more than a due proportion of the judgment is satisfied out of the proceeds of the sale of the property of one of them, or one of them pays without a sale more than his proportion, he may compel contribution from the others; and when a judgment is against several and is upon an obligation of one of them as security for another, and the surety pays the amount, or any part thereof, either by a sale of his property or before sale, he can compel repayment from the principal; in such case, the person so paying or contributing is entitled to the benefit of the judgment to enforce contribution or repayment, if, within ten days after such payment he file with the clerk of the court where the judgment was rendered notice of his payment and claim to contribution or repayment.

Upon filing such notice the clerk must make an entry thereof in the margin of the docket.

50. Reynolds v. Harris, 14 Cal. 667; Reynolds v. Hosmer, 45 Cal. 629.

CHAPTER XXXV.

OF PROCEEDINGS SUPPLEMENTAL TO EXECUTION.

Proceedings supplemental to execution under the provisions of the Code of Civil Procedure, sections 714-721, were intended to take the place of creditor's bills, under the former chancery practice,[1] although there may be cases in which a creditor's bill may be maintained, but these statutory remedies must be pursued except in such exceptional cases.[2]

When an execution against property of the judgment debtor, or of one of several debtors in the same judgment issued to the sheriff of the county where the debtor resides, or if he do not reside in this state, to the sheriff of the county where the judgment roll is filed, is *returned* unsatisfied in whole or in part, the judgment creditor, at any time after the return is made, is entitled to an order from the judge of the court, requiring such judgment debtor to appear and answer concerning his property before such judge or a referee appointed by him at a time and place specified in the order; but no judgment debtor must be required to attend before a judge or referee out of the county in which he resides;[3] and after the issuing of an execution against property and before its return, upon proof by affidavit of a party or otherwise, to the satisfaction of the judge of the court, that any judgment debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment, such judge may, by an order, require the judgment debtor to appear at a specified time and place before such judge or referee appointed by him to answer concerning the same; and such proceedings may thereupon be had for the application of the property of the judgment

1. Herrlich v. Kaufmann, 99 Cal. 275, 276.
2. Same case, 276.
3. Code of Civil Procedure, Sec. 714.

debtor towards the satisfaction of the judgment as are provided upon the return of execution.[4]

After the issuing or return of an execution against the property of a judgment or of any one of several debtors in the same judgment or upon proof by affidavit or otherwise, to the satisfaction of such judge, that any person or corporation has property of such judgment debtor, or is indebted to him in an amount exceeding fifty dollars, the judge may by an order require such person or corporation, or any officer or member thereof, to appear at a specified time and place before him or a referee appointed by him, and answer concerning the same.[5]

Any witness may be required to appear and testify before a judge or referee in any of such proceedings.[6]

On the hearing in such proceedings the judge or referee may order any property of a judgment debtor not exempt from execution, in the hands of such debtor, or any other person, or due to the judgment debtor, to be applied toward the satisfaction of the judgment.[7]

But if it appear that the person or corporation alleged to have property of the judgment debtor, or to be indebted to him, claims an interest in the property, adverse to him, or denies the debt, the court or judge may authorize, by an order made to that effect, the judgment creditor to institute an action against such person or corporation for the recovery of such interest or debt; and the court or judge may by order forbid a transfer or other disposition of such interest or debt until such action can be commenced and prosecuted to judgment, and the court or judge may thereafter modify such order or vacate it upon such terms as may be just.[8]

Such supplemental proceedings are not a new action, but they are proceedings in the original action.[9]

If the person alleged to have property belonging to the judgment debtor or is alleged to be indebted to the judgment debtor, claim the property or a lien thereon, or denies the indebt-

4. Code of Civil Procedure, Sec. 715.
5. Code of Civil Procedure, Sec. 717.
6. Code of Civil Procedure, Sec. 718.
7. Code of Civil Procedure, Sec. 719.
8. Code of Civil Procedure, Sec. 720.
9. Collins v. Angell, 72 Cal. 513.

edness, the court has no jurisdiction to make any order that the property or indebtedness be applied to the satisfaction of the judgment; the only order which the court or judge has jurisdiction to make in such cases are the orders authorized to be made by the court under the provisions of section 720 of the Code of Civil Procedure, in respect to authorizing the judgment creditor to commence an action as in said section provided and forbidding a transfer or other disposition of the interest in the property or the debt, as in that section provided, and an order appointing a receiver.[10] [11]

The court has no jurisdiction in a supplemental proceeding to order property of the judgment debtor in the hands of a person other than the judgment debtor to be applied towards the satisfaction of the judgment against such judgment debtor, until such other person has been examined or answered in the proceeding.[12]

An appeal may be taken from an order made by a court or referee in proceedings supplementary to an execution, and if such appeal be not taken, the order of the court or referee that property be applied to the satisfaction of the judgment is conclusive (if such court or referee had jurisdiction to make such order).[13]

If, in such supplemental proceedings, the court finds a garnishee to be indebted to the judgment debtor in an amount found by the court, and the court makes an order that such garnishee pay the judgment creditor the amount of such indebtedness as found by the court, such order is in the nature of a judgment, and an appeal can be taken from the order; but the order cannot be collaterally attacked, and an execution can be issued to enforce the order, or an action can be maintained thereon.[14]

Proceedings supplemental to execution reach choses in action arising from torts committed on the property of the judgment debtor.[15]

10. Hartmann v. Olvera, 51 Cal. 501; McDowell v. Bell, 86 Cal. 615; Lewis v. Chamberlain, 108 Cal. 527.
11. Deering v. Richardson Kimball Co., 109 Cal. 73; Hathaway v. Brady, 26 Cal. 593.
12. Hathaway v. Brady, 26 Cal. 582.
13. McCullough v. Clark, 41 Cal. 298.
14. Bronzan v. Drobaz, 93 Cal. 647.
15. Staples v. May, 87 Cal. 179.

The court can in a proper case appoint a receiver to carry into effect its order in proceedings supplemental to execution.[16]

After the issuing of an execution against property and before its return, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt or so much thereof as may be necessary to satisfy the execution; and the sheriff's receipt is a sufficient discharge for the amount so paid.[17]

But the debtor of such judgment debtor cannot be protected in making such payment unless the money so paid was actually due at the time of the payment. In fact, the debtor of such judgment debtor, if he make such payment, unless directed to do so by a valid order of the court, in order to be protected by the payment, must prove that all the facts existed which under the provisions of said section 716 authorized such payment to be made.[18]

Under section 715 of the Code of Civil Procedure, if it appear to the judge to whom application is made in proceedings supplemental to execution that an order should be made that the judgment debtor appear and answer concerning his property, and it appears from the affidavit of the judgment creditor, his agent or attorney, that there is danger of the judgment debtor absconding, such judge may order the arrest of such debtor, and that he be brought before the judge, who may require of him an undertaking with sufficient surety conditioned, as in that section provided.

Although a judgment debtor can be examined concerning his property in proceedings supplementary to *execution*, a defendant in an attachment suit cannot be examined concerning his property, before judgment is rendered in such attachment suit.[19]

16. Hathaway v. Brady, 26 Cal. 593.
17. Code of Civil Procedure, Sec. 716.
18. Brown v. Ayres, 33 Cal. 525.
19. Ex parte Rickleton, 51 Cal. 316.

CHAPTER XXXVI.

OF EXCEPTIONS AND NEW TRIALS.

The rendition of a judgment in an action and its entry and docketing is not the final determination of the action in the court in which it is tried except for the purpose of an appeal, unless there be no appeal authorized by the constitution or by statute.

The party in whose favor it is rendered and entered is entitled to proceedings for the enforcement of such judgment unless such proceedings be stayed by an order of the court. Such stay is usually granted for a reasonable time by the court, and the court may require from the judgment debtor a bond to indemnify the judgment creditor from loss by reason of such stay.

A new trial of an action may be granted by the court in which the judgment was rendered for any or all of the causes specified as grounds for a new trial in section 657 of the Code of Civil Procedure, in case an application be made for a new trial as prescribed in that code.

A party to an action is not entitled to a new trial on the ground of an error in law occurring at the trial, unless he takes an exception to the decision claimed to be erroneous at the time the decision was made, except as provided in section 647 of the Code of Civil Procedure. The provisions of that section are: that the verdict of the jury, the final decision in an action or proceeding, an interlocutory order or decision finally determining the rights of the parties, or of some of them, an order or decision from which an appeal may be taken, an order sustaining or overruling a demurrer, allowing or refusing to allow an amendment to a pleading, striking out a pleading, or a portion thereof, refusing a continuance, an order made upon ex parte application, and an order or decision made in the absence of a party, are deemed to have been excepted to.

No particular form of exception is required, but when the exception to the verdict or decision is upon the ground of the insufficiency of the evidence to justify it, the objection must specify the particulars in which such evidence is claimed to be insufficient. The objection must be stated with so much of the evidence or other matter as is necessary to explain it and no more: a bill containing the exception to any decision may be presented to the court or judge for settlement at the time the decision is made, and after having been settled must be signed by the judge and filed with the clerk. When the decision objected to is made by a tribunal other than a court or by a judicial officer, the bill of exceptions shall be presented to and settled by such tribunal or officer.[1]

If the bill of exceptions be not settled at the time the decision excepted to is made, the party desiring to have such bill of exceptions settled and allowed, may within ten days after the entry of the judgment, if the action be tried by a jury, or within ten days after receiving notice of the entry of the judgment, if the action be tried without a jury, or within such further time as the court in which the action is pending or a judge thereof may allow, prepare a draft of the bill and serve the same or a copy thereof, upon the adverse party. Such draft must contain all the exceptions taken upon which the party relies.

Within ten days after such service, the adverse party may propose amendments thereto, and serve the same or a copy thereof upon the other party. The proposed bill of exceptions and amendments must, within ten days thereafter, be presented by the party seeking the settlement of the bill, upon five days' notice to the adverse party, to the judge or referee who tried or heard the case, for settlement, and thereupon the judge or referee who tried the case must settle the bill. If, however, the case was tried by a judge, the bill of exceptions and amendments may be delivered to the clerk of the court for the judge, and the clerk must deliver them immediately to the judge, if within the county, or must immediately forward them by mail or other safe channel to the judge if absent from the county, upon notice in writing so to do; if not so forwarded the clerk must deliver them to the judge immediately on his return to the county.

1. Code of Civil Procedure, Secs. 648, 649.

When so received from the clerk, the judge must designate the time at which he will settle the bill, and the clerk must immediately notify the parties of such designation, and at the time designated the judge must settle the bill.

If no amendments be served, or if served, they are allowed, the proposed bill may be presented, with the amendments, if any, to the judge or referee for settlement, without notice to the adverse party. It is the duty of the judge or referee in settling the bill, to strike out of it all redundant and useless matter so that the exception may be presented as briefly as possible.

When settled, the bill must be signed by the judge or referee, with his certificate that the same is allowed and shall then be filed with the clerk.[2]

The bill of exception so certified may be used on an appeal from the judgment to the Supreme Court, but it cannot be considered on such appeal for the purpose of reviewing the evidence, unless the appeal from the judgment be taken within sixty days after the judgment was entered.[a]

The party intending to move for a new trial must within ten days after the verdict of the jury, if the action be tried by a jury, or after notice of the decision of the court or referee, if the action be tried without a jury, file with the clerk, and serve upon the adverse party a notice of his intention to move for a new trial, designating the grounds upon which the motion will be made, and whether the same will be made on affidavits or on the minutes of the court, or on a bill of exceptions, or on a statement of the case.[3]

The time prescribed by statute within which such act is to be done may be extended by the judge of the court in which the action is pending, or by the judge who presided at the trial of the action upon good cause shown, for a period not to exceed thirty days, without the consent of the adverse party.[4]

Such extension of time as to giving a notice of intention to move for a new trial, however, must be made before the statutory time for giving and filing such notice has expired.[5]

2. Code of Civil Procedure, Sec. 650.
3. Code of Civil Procedure, Sec. 659.
3. Code of Civil Procedure, Sec. 659.
4. Code of Civil Procedure, Sec. 1054; Burton v. Todd, 68 Cal. 487.
5. Clark v. Crane, judge, 57 Cal. 629.

The statutory time for giving and filing such notice may be extended by stipulation of counsel of the parties to an action.[6]

In an equity case the verdict of the jury is advisory merely, and an equity case is not tried by a jury within the intent and meaning of said section 658, although a jury may find a special verdict in such case, and a party to such action has ten days after notice of the decision of the court in such action, to give and file his notice of his intention to move for a new trial in the action.[7]

Written notice of the decision of the court may be waived by the acts of the party entitled to receive it,[8] and the time of such waiver is to be deemed the time at which the party waiving such notice received it.[9]

A premature notice of intention to move for a new trial has no validity.[10]

The notice of intention to move for a new trial, and the preparations of a statement or bill of exceptions, its service, its presentation for settlement, and the notice of such presentation, must be given and made within the times as prescribed by the code, or a valid order of the judge, or stipulation of counsel, and if this had not been done, and if objection be made at such settlement, that this had not been done within such times, pointing out the particulars wherein this had not been done, and objecting to the settlement and allowance of the statement or bill of exceptions on that ground, then if such objection be overruled, and exception taken to such ruling, such statement or bill of exceptions cannot be considered on a motion for a new trial in the action.[11]

The time provided by statute when any of these acts must be done may, however, before such time as fixed by statute has expired, for good cause, be extended by the judge, as provided in section 1054 of the Code of Civil Procedure, and may be extended by stipulation of counsel; and in a case of mistake, inadvertence,

6. Simpson v. Budd, judge, 91 Cal. 489.
7. Bell v. Marsh, 80 Cal. 411.
8. Forni v. Yoell, 99 Cal. 177, 178.
9. Forni v. Yoell, 99 Cal. 177, 178; Gray v. Winder, 77 Cal. 525.
10. Spottiswood v. Weir, 66 Cal. 529; Dominguez vs. Mascotti, 74 Cal. 270.
11. Henry v. Merguire, 106 Cal. 142

surprise or excusable neglect, relief may be granted by the court under the provisions of section 473 of the Code of Civil Procedure.

When an application for a new trial is made on the ground of irregularity in the proceedings of the court, jury or adverse party, or of any order of the court, or an abuse of its discretion, by which the party applying for a new trial was prevented from having a fair trial, or for misconduct of the jury, or by reason of accident or surprise, which ordinary prudence could not have guarded against, or for newly discovered evidence material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial, or for all or any of such causes, the application must be made upon affidavits; when the application is made on the ground of excessive damages appearing to have been given under the influence of passion or prejudice, or of insufficiency of the evidence to justify the verdict or other decision, or that it is against law, or for errors in law occurring at the trial and excepted to by the party making the application, or for all or any of these causes, the application for a new trial may be made at the option of the moving party, either upon the minutes of the court or a bill of exceptions, or a statement of the case.[12]

If the motion is to be made upon affidavits in whole or in part, the moving party must, within ten days after serving the notice of intention to move for a new trial, or within such further time as stipulation of counsel, the court in which the action is pending, or a judge thereof may allow, file such affidavits with the clerk and serve a copy upon the adverse party, who shall have ten days after service to file counter affidavits, a copy of which must be served upon the moving party.

If the motion is to be made on a bill of exceptions, and such bill has been settled and filed when the notice of intention to move for a new trial is given, such bill should be used on the motion, but if no bill has been settled, then the moving party shall have the same time after the service of the notice of intention to move for a new trial to prepare and obtain a settlement of the bill, as is provided, after the entry of judgment, or after

12. Code of Civil Procedure, Secs. 658, 657.

receiving notice of such entry, by section 650 of the Code of Civil Procedure, and the bill shall be prepared and settled in a similar manner and as provided in said section 650.

If the motion is to be made upon a statement of the case, the moving party must, within ten days after service of the notice of intention to move for a new trial, or such further time as counsel by stipulation, or the court in which the action is pending, or the judge thereof may allow, prepare a draft of the statement and serve the same or a copy thereof upon the adverse party. If such proposed statement be not agreed to by the adverse party, he must within ten days thereafter prepare amendments thereto and serve the same, or a copy thereof upon the moving party. If the amendments be adopted, the statement shall be amended accordingly, and then be presented to the judge or referee who tried the cause, for settlement.

If not adopted then the proposed statement and amendments shall within ten days thereafter be presented for settlement by the moving party to the judge or referee who tried the cause, upon five days' notice to the adverse party. The same proceedings shall be taken by the parties, the clerk and judge or referee, as are required for the settlement of bills of exceptions by section 650 of the Code of Civil Procedure. If no amendments are served within the time designated, the proposed statement may be presented to the judge or referee for settlement, without notice to the adverse party. When the notice of the motion, designates as a ground of the motion, insufficiency of the evidence to justify the verdict or other decision, the statement shall specify the particulars in which such evidence is so insufficient. When the notice designates as a ground of the motion errors of law occurring at the trial and excepted to by the moving party, the statement shall specify the particular errors upon which the party will rely. If no such specifications be made, the statement shall be disregarded on the hearing of the motion, so far as it is based on insufficiency of the evidence, or errors in law occurring at the trial. It is the duty of the judge or referee in settling the statement, to strike out of it all redundant and useless matter, and to make the statement truly represent the case, notwithstanding the assent of the parties to such redundant and useless matter, or to any inaccurate statement.

When settled, the statement shall be signed by the judge or referee with his certificate to the effect that the same is allowed, and shall then be filed with the clerk.[13]

Section 652 provides for the proving of an exception in case the judge refuses to allow such exception in accordance with the facts, and for the certifying of such exception so proven; section 653 of the same code provides for the settlement of the bill of exceptions when the decision excepted to was made by a judicial officer other than a judge, and further provides that a judge or judicial officer may settle and sign a bill of exceptions after as well as before he ceases to be such judge or judicial officer; and provides for the settling and certifying of bills of exceptions and statements when such judge or judicial officer, before the bill of exceptions is settled, dies, is removed from office, becomes disqualified, is absent from the state or refuses to settle the same.

A bill of exceptions must contain all the exceptions taken upon which the party relies,[14] and must, when the exception to the verdict or decision is upon the grounds of insufficiency of the evidence to justify it, specify the particulars in which such evidence is insufficient.[15]

The statement must specify like particulars as to the evidence, and must specify the particular errors in law upon which the party will rely in his motion for a new trial.[16]

If the motion for a new trial be made on the minutes of the court, the notice of the motion must specify the particulars in respect to the insufficiency of the evidence and in respect to the errors in law which are required to be stated in a statement to be used on such motion.[17]

The verdict of a jury may also be vacated and a new trial granted by the court in which the action is pending on its own motion, without the application of either of the parties, when there has been such a plain disregard by the jury of the instructions of the court, or the evidence in the case as to satisfy the court that the verdict was rendered under a misapprehension of

13. Code of Civil Procedure, Sec. 659 Sub. 3.
14. Code of Civil Procedure, Sec. 650.
15. Code of Civil Procedure, Sec. 648.
16. Code of Civil Procedure, Sec. 659.
17. Code of Civil Procedure, Sec. 659, Sub. 4.

such instructions, or under the influence of passion or prejudice. Such order of the court may be reviewed on appeal in the same manner as orders made on motions for a new trial.[18]

In case of an order of the court granting or denying a motion for a new trial, if such motion be made on the minutes of the court, and in case the court by its order on its own motion vacates the verdict of a jury and grants a new trial, the party appealing or intending to appeal therefrom to the Supreme Court, must prepare a statement to be used on such appeal within ten days after the entry of such order, or such further time as the court within which the action is pending, or the judge thereof, may allow, and serve the same, or a copy thereof, upon the adverse party, who shall have ten days thereafter to prepare amendments thereto and serve the same upon the party appealing or intending to appeal, and thereafter proceedings shall be had in like periods and in like manner for the settlement of the statement, as are provided by section 659 of the Code of Civil Procedure. A motion for a new trial may be brought to a hearing on motion by either party.[19]

By the provisions of section 663 of the Code of Civil Procedure, as amended in 1897, a judgment or decree of a Superior Court, when based upon findings of fact made by the court, or on the special verdict of a jury, may, upon motion of the party aggrieved, be set aside and vacated by the same court, and another or different judgement entered for either of the following causes, materially affecting the substantial rights of such party and entitling him to a different judgment:

1. Incorrect or erroneous conclusions of law not consistent with, or not supported by the findings of fact; and in such case when the judgment is set aside, the conclusions of law shall be amended and corrected.

2. A judgment or decree not consistent with or supported by a special verdict. By the provisions of section 663½ of the same code, the party intending to make such motion must within ten days after notice of the rendition of such judgment or decree, serve upon the adverse party and file with the clerk of the court a notice of his intention, designating the grounds upon which the

18. Code of Civil Procedure, Sec. 662.
19. Code of Civil Procedure, Sec. 660, 661, 662.

motion will be made, and specifying the particulars in which the conclusions of law are not consistent with the findings of fact, or in which the judgment or decree is not consistent with the special verdict; and must within sixty days after giving such notice, make the motion to the court, after giving to the adverse party due notice of the time of making such motion.[20]

The right to move for a new trial is statutory, and must be pursued in the manner pointed out by the statute.[21]

A mistake in a notice of intention to move for a new trial, if it does not mislead the adverse parties, is immaterial.[22]

When it is stated in the notice that the motion would be made, on a statement, a bill of exceptions, and on the minutes of the court, and it was made on a statement alone, the notice was held to be sufficient.[23]

If the adverse party be not misled by the notice, and it complies substantially with the statutory provisions for a notice of intention to move for a new trial, the notice will be deemed to be sufficient.[24]

Neither insufficiency of the evidence to justify the *judgment*, nor that the *judgment* is against the law, is a statutory cause on which to base a motion for a new trial. The motion should be directed at the *decision*.[25]

A notice of intention to move for a new trial need not state that the party moving will ask that the verdict or decision be vacated.[26]

A party moving on the minutes of the court may rely on all matters that could be legitimately included in a statement settled in advance of the motion, although there was no reporter at the time of the trial, nor testimony reduced to writing by the judge or by the clerk.[27]

But when a motion is made on the minutes of the court, upon the ground of the insufficiency of the evidence, or for

20. Code of Civil Procedure, Sec. 663, 663½.
21. Burton v. Todd, 68 Cal. 485; Mazkewitz v. Pimentel, 83 Cal. 450; Hill v. Beatty, 61 Cal. 292.
22. Cook v. Sudden, 94 Cal. 443.
23. Hart v. Kimball, 72 Cal. 283.
24. O'Connell v. Hotel Co., 90 Cal. 518, 519.
25. Sawyer v. Sargent, 65 Cal. 259.
26. Heinlen vs. Heilbron, 71 Cal. 557.
27. Malcolmson v. Harris, 90 Cal. 262, 265.

errors of law occurring at the trial, the motion must be denied if the specifications required by the fourth subdivision of section 659 of the Code of Civil Procedure have not been made in the notice of intention to move for a new trial.[28]

A radically defective notice of intention to move for a new trial cannot be amended after the expiration of the statutory time for its filing.[29]

When it appears from the statement that the adverse party did not object, that the notice of intention to move for a new trial was not served in time, when the notice of motion for a new trial was served, or at the settlement of the statement, the defect, if any, as to the time of serving of such notice is waived.[30]

When a motion for a new trial is made on affidavits, and counter affidavits have been made but not filed, by reason of inadvertence, within the time required by statute, it is within the discretion of the court to permit such counter affidavits to be read upon a proper showing of excusable neglect.[31]

If the failure of a party to procure additional time to prepare, serve and file a statement on his motion for a new trial was the result of excusable neglect or mistake, the court has power to relieve him from the effect thereof.[32]

If the time to prepare, serve and file a statement on motion for a new trial has been extended by stipulation of the attorney of the adverse party, the judge of the court in which the action is pending, for good cause may, under the provisions of section 1054 of the Code of Civil Procedure, further extend such time not to exceed thirty days, if the order extending the time is made before the time as extended by stipulation has expired.[33]

The statutory time for giving notice of intention to move for a new trial and for the preparation of statements and bills of exceptions may be extended by stipulation of counsel, although such stipulations were not filed before the statutory time for giv-

28. Neale v. Depot Railway Co., 94 Cal. 425.
29. Packer v. Doray, 98 Cal. 315.
30. Schieffery v. Tapia, 68 Cal. 184.
31. Smith v. Whittier, 95 Cal. 280.
32. Cole v. Wilcox, 99 Cal. 551.
33. Curtis v. Superior Court, 70 Cal. 390.

ing the notice, and preparing, giving and filing the statement or bill of exception had expired.[34]

The notice of intention to move for a new trial must be both served and filed within the time fixed by statute, if the time for so doing has not been extended.[35]

The notice if radically defective cannot be amended after the expiration of the time fixed for giving such notice.[36] A new notice of intention to move for a new trial given in place of the first notice does not extend the time as fixed by the first notice.[37]

The court cannot restore the right to give a notice of intention to move for a new trial after the right to move for a new trial is lost.[38]

If the notice of motion was not given in time, this must appear from the record in the case, on an appeal from the order granting a new trial.[39]

When the motion for a new trial is heard on affidavits, the objection that such affidavits are filed too late can be made on the hearing of the motion.[40]

The time within which counter affidavits may be filed on a motion for a new trial is not jurisdictional, but it is only a rule of procedure subject to the equitable control of the court.[41]

A judge of a Superior Court of a county who has held a session of a Superior Court in another county, can, while in the county of his residence, grant an order extending the time to prepare and serve a statement in an action tried before him in such other county.[42]

It is the duty of the party preparing a statement upon a motion for a new trial to have incorporated in such statement so much of the evidence as may be necessary to explain the grounds upon which he intends to rely upon the motion, and no more, and the performance of this duty cannot be dispensed with by reason of any stipulation of counsel.[43]

34. Simpson v. Budd, 91 Cal. 488.
35. Sutton v. Symons, 100 Cal. 576.
36. Little v. Jacks, 67 Cal. 165.
37. Leroy v. Rossette, 32 Cal. 171.
38. Thompson v. Lyons, 43 Cal. 483.
39. Hook v. Hall, 68 Cal. 22.
40. Hein v. Treadwell, 72 Cal. 221.
41. Smith v. Whittier, 95 Cal. 295.
42. Matthews v. Superior Court, 68 Cal. 638.
43. Adams v. Lambard, 80 Cal. 426.

The Supreme Court will consider no claimed errors in law occurring at the trial when the motion is made on a statement of the case, except such as are specified in the statement.[44]

It is not sufficient that there are exceptions to the rulings of the court scattered through the statement, there must be a specification in the statement of the particular errors in law upon which the party moving for a new trial will rely on such motion.[45]

A statement which contains no specifications of the particulars in which the evidence is insufficient to justify the verdict of the jury, or the decision of the court, will be disregarded on the motion for a new trial, so far as the motion is based on such claimed insufficiency.[46]

The statement on motion for a new trial should specify the particulars in which the evidence is insufficient to justify the verdict or decision in the case. A statement of what the evidence does show is surplusage.[47]

But the object of the statute requiring specifications in a statement is to direct the attention of the court and adverse party to the particular point on which the evidence is claimed to be insufficient, and this may be done by pointing out in the statement particulars of what the evidence does show.[48] In Kumle v. Grand Lodge A. O. U. W., 110 Cal. 213, it was held, however, that a statement of particulars of what the evidence did show was not a statement of particulars of what the evidence did not show.

If the statement and amendments thereto be not presented to the judge who tried the case for settlement within the time prescribed by the Code of Civil Procedure, or within the time legally extended by the judge, or by stipulation of counsel, then, unless such statement was left with the clerk within such time, for the judge, or the objection is waived, such statement will be disregarded.[49]

After a statement has been settled and allowed by the judge

44. Bohnart v. Bohnart, 95 Cal. 444; Joyce v. White, 95 Cal. 236; Nye v. Marysville St. R. R. Co., 97 Cal. 461.
45. Beans v. Emanuelli, 36 Cal. 121.
46. Green v. Green, 103 Cal. 111.
47. Adams v. Helbing, 107 Cal. 302.
48. In re Yoakam, 103 Cal. 504, 505; Smith v. Ellis, 103 Cal. 236; Harnett v. C. P. R. R. Co., 78 Cal. 32.
49. Henry v. Merguire, 106 Cal. 146.

and filed with the clerk, the court may vacate such settlement and allowance and allow it to be re-engrossed so as to include exhibits referred to therein, which had not been engrossed therein at length.[50]

The court in its exercise of a sound discretion may grant a new trial in a case in which the evidence on the trial was conflicting.[51]

If the court refuses to receive evidence, or disregards it in its rulings, exceptions should be taken, and the motion for a new trial should be heard on a bill of exceptions or statement, and not on affidavits.[52]

It was held in Pierce v. Willis, 103 Cal. 91, that the court was not authorized to grant in that case a new trial on the ground that the conclusions of law, from the facts found were against law.[53]

The failure of an attorney to sign a proposed statement, if the attorney of the adverse party be not misled thereby, would be no ground for a refusal to settle and allow the statement.[54]

A statement which does not contain, when served on the adverse party, any specification of the particulars in which it is claimed the evidence is insufficient to support the verdict of the jury, may be permitted by the court to be amended within a reasonable time by the insertion therein of such specifications.[55]

A statement on a motion for a new trial, which was filed after the motion had been decided, cannot be looked into on an appeal, for the purpose of reversing the decision.[56]

When a motion for a new trial is to be made on a statement of a case, an order denying the motion before the statement had been settled and allowed will be reversed on an appeal from such order, and pending such appeal the trial court cannot vacate such order.[57]

In case the evidence on the trial be conflicting and the trial court is satisfied that the verdict of the jury is contrary to the

50. Warren v. Cleaning Works, 105 Cal. 409.
51. Warren v. Cleaning Works, 105 Cal. 409.
52. Santa Cruz R. T. Co. v. Bowie, 104 Cal. 286.
53. Pierce v. Willis, 103 Cal. 91.
54. Pearce v. Boggs, 99 Cal. 340.
55. Smith v. Stockton, 73 Cal. 204.
56. Mills v. Dearborn, 82 Cal. 52.
57. Stewart v. Taylor, 68 Cal. 7.

weight of the evidence, such court should grant a new trial.[58]

An order by the Supreme Court granting a new trial necessarily vacates and sets aside the judgment in the action.[59] But such order, if made by the trial court, does not vacate the judgment until such order, if appealed from, is affirmed, or the time to appeal from the order has expired.[60]

A party to an action who has separately appeared by an attorney in the action and filed a pleading therein, is not affected by an order granting a new trial if he appeals from such order, unless notice of intention to move for a new trial was served on his attorney.[61]

An order granting or denying a new trial made by a trial court having jurisdiction to make such order cannot be vacated by that court.[62]

But the trial court can vacate such order if inadvertently made.[63]

The trial court, however, may, even after appeal from an order denying a new trial, by a *nunc pro tunc* order, correct the order appealed from by adding a proper recital thereto.[64]

A party to an action is not entitled to make a second motion for a new trial after his first motion for a new trial has been denied.[65]

When the issues in an action are separable, the losing party may move for a new trial as to a part, leaving the findings to stand as to the remainder,[66] and the court may grant a new trial as to one of several separable issues, and deny it as to the other issues in the action.[67]

The trial court has the right to make an order granting a new trial to a defendant to take effect upon the performance of a condition by the party in whose favor the order is made.[68]

And if the condition be not performed within the time lim-

58. Bjorman v. Fort B. B. Co., 92 Cal. 500.
59. Wheeler v. Kassabaum, 76 Cal. 90.
60. Pierce v. Birkholm, 110 Cal. 671.
61. Wittenbrock v. Bellmer, et al., 57 Cal. 14.
62. Dorland v. Cunningham, 66 Cal. 484.
63. Hall v. Polack, 42 Cal. 218.
64. Combination Land Co. v. Morgan, 95 Cal. 548.
65. Eagan v. Eagan, 90 Cal. 15.
66. San Diego L. & T. Co. v. Neale, 78 Cal. 63.
67. Duff v. Duff, 101 Cal. 1.
68. Garoutte v. Haley, 104 Cal. 497; 110 Cal. 173.

ited in the order for its performance, the motion for a new trial must be regarded as having been denied.[69]

In granting a new trial as to certain issues only, the trial court should point out and designate such issues with certainty.[70]

The prosecution of an action in equity, by a bill of review for a new trial in an action at law, must be commenced within the time allowed by law for the prosecution of an appeal, or writ of error in the action at law,[71] and such action in equity cannot be maintained if the plaintiff in the action in equity knew of the judgment against him in the action at law, in time, to have moved for a new trial in that action, unless he shows that he had no opportunity to move for a new trial by reason of some mistake, accident or surprise unaccompanied by any fault or negligence on his part.[72]

A party who is unprepared for trial at the time the case is called for trial should move for a continuance, and if he fail to do so, he waives his want of preparation for trial and he cannot thereafter have granted to him a new trial on that ground.[73]

If a party to an action be misled by statements of counsel of the opposite party as to the time of the trial of the action and for that reason did not prepare for the trial of the action, that fact would be a good ground for a continuance, and for a new trial, if a motion for a continuance was made on that ground and denied.[74]

If a party to an action intentionally is absent from the court in which the action was to be tried at the time it came on regularly to be tried, and he had actual knowledge of such time and was not misled by the opposite party as to the time the action would be tried, and employs no attorney to represent him on such trial, such party is not entitled to a new trial on the ground that his absence at the time of the trial of the action was the result of accident or surprise.[75]

The failure of the judge of the trial court to file his decision

69. Garoutte v. Williamson, 108 Cal. 135.
70. Mountain T. G. M. Co. v. Bryan, 111 Cal. 36.
71. Allen v. Currey, 41 Cal. 321.
72. Mastick v. Thorp, 29 Cal. 444.
73. Turner v. Morrison, 11 Cal. 21.
74. Symons v. Bunnell, 80 Cal. 330.
75. McGuire v. Drew, 83 Cal. 225.

within thirty days from the time of the submission of the cause, is no ground for a new trial.[76]

A new trial will not be granted on the ground of excessive damages unless the damages allowed are so disproportionate to the injury that it is apparent that such damages were not awarded by reason of a fair and dispassionate consideration of the evidence in the case.[77]

A new trial will be granted to the plaintiff when it appears from the evidence that the damages awarded on the trial to the plaintiff were insignificant in proportion to the injury received.[78]

A verdict in disobedience to the instructions of the court is against law, and a new trial may be granted on that ground.[79]

A judgment based upon findings which do not determine all the issues raised by the pleadings, which are material to be found to sustain such judgment, is a decision against law, for which a new trial may be granted.[80]

76. McLennon v. Bank of Cal., 87 Cal. 569.
77. Wheaton v. M. R. & M. R. R. Co., 36 Cal. 590.
78. Bennett v. Hobro, 72 Cal. 178.
79. Decles v. Save, 71 Cal. 552.
80. Knight v. Roche, 56 Cal. 15.

CHAPTER XXXVII.

OF APPEALS TO THE SUPREME COURT.

The jurisdiction of the Supreme Court is derived from the constitution alone and the legislature can neither enlarge nor restrict it;[1] but the legislature may prescribe the mode in which appeals to the Supreme Court may be taken;[2] and when an appeal is given by statute, that remedy is exclusive.[3]

The mode prescribed by the legislature in which an appeal is to be taken to the Supreme Court is that the party appealing must file with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and serving a similar notice on the adverse party or his attorney. The order of service is immaterial, that is, whether such notice be first filed, or be first served, but the appeal is ineffectual for any purpose unless within five days after service of the notice of appeal, there be filed with the clerk of the court in which the judgment or order appealed from is entered, an undertaking on the appeal executed, on the part of the appellant, by at least two sureties to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal, or on a dismissal thereof, not exceeding three hundred dollars; or that sum must be deposited with such clerk to abide the event of the appeal.[3a]

The same notice of appeal may embrace notices of appeal from a judgment in an action and from an order refusing to grant a new trial in the action and from other appealable orders in the same action, if the several subjects of the appeal be distinctly stated in the notice, but the undertaking or deposit

1. Ex parte Houghton, 42 Cal. 35, opinion of Rhodes, C. J.
2. Haight v. Gay, 8 Cal. 297.
3. Same case.
3a. Code of Civil Procedure, Sec. 940.

required by statute to make the appeal from the judgment, and from each order stated in the notice effectual, must be filed or deposited, with the one exception, and that is, in the case of an appeal from the judgment and from an order refusing to grant a new trial in an action, in which case but one statutory undertaking in the sum of three hundred dollars, or one deposit of the sum of three hundred dollars need be filed or made, in order to make the two appeals effectual.[4]

When the appealing party has two attorneys of record in the trial court, or a firm of attorneys, any one of such attorneys can sign the notice of appeal.[5]

Even if the attorney signing such notice has not been admitted to practice in the Supreme Court, provided he is qualified to act as the attorney of record in the trial court.[6]

If an attorney who is not an attorney in the action in the trial court signs as the attorney for the appellant the notice of appeal, and the attorney for the respondent joins with him in certifying to the transcript on the appeal, the objection that the attorney who signed the notice was not an attorney of record in the trial court, is waived.[7]

A notice of appeal which contains mistakes that are not misleading and which in other respects is a valid notice, will not be held to be invalid by reason of such mistakes, nor by reason of any superfluous and unnecessary matters therein contained.[8]

An appeal will not be dismissed if a proper undertaking on the appeal be filed within five days after *service* of the notice of appeal, although such notice of appeal was not filed with the clerk until after such undertaking was filed. The undertaking on appeal must be filed within five days after *service* of the notice of appeal.[9]

But the notice of appeal must be *served* before the undertak-

4. Sharon v. Sharon, 68 Cal. 326; Centerville etc. Co. v. Bachtold, 109 Cal. 111.
5. Cockrill v. Hall, 76 Cal. 192.
6. Beardsley v. Frame, 73 Cal. 634.
7. McDonald v. McConkey, 54 Cal. 143.
8. Meley v. Boulon, 104 Cal. 262; Butler v. Ashworth, 100 Cal. 334. See also 83 Cal. 136; 69 Cal. 202; 72 Cal. 65; 71 Cal. 493; 86 Cal. 430; 69 Cal. 112.
9. Hewes v. Carrville M. Co., 62 Cal. 516.

ing on appeal is *filed,* or the appeal will, on motion, be dismissed.[10]

The period of time fixed by statute for the taking of an appeal is pre-emptory and inflexible, and cannot be extended, or varied by extrinsic circumstances, and a notice of an appeal from a judgment given after the expiration of one year from the entry of the judgment is ineffectual for any purpose.[11]

The notice of appeal must be served on every adverse party interested in the judgment and who would be affected by its reversal, and if not so served, the appeal will be dismissed.[12]

The notice of appeal from a judgment need not be served on parties to an action, who would not be affected by a reversal of the judgment on such appeal.[13]

An adverse party to an appeal, means the party whose interest in relation to the subject of appeal is in conflict with the reversal of the order or decree appealed from, or with the modification sought for on an appeal.[14]

The jurisdiction of the Supreme Court on an appeal depends on the fact that the notice of such appeal has been properly served, and not upon the proof of the fact being contained in the transcript. The appellant may file in the Supreme Court either original proof of such service, or a certificate of the clerk of the court below showing that proof of such service has been filed in that court.[15]

When the notice of appeal embraces notices of appeal from a judgment and an order, or from several distinct orders, there must be a separate statutory undertaking, or a separate deposit as required by sections 940 and 941 of the Code of Civil Procedure, on the appeal from the judgment, and on the appeal from each order, except in the case of an appeal from a judgment in an action and from an order refusing to grant a new trial

10. Little v. Jacks, 68 Cal. 343.
11. Henry v. Mergnire, 111 Cal. 1; Code of Civil Procedure, Sec. 1054.
12. Lancaster v. Maxwell, 108 Cal. 67. See also 111 Cal. 519; 111 Cal. 428; 106 Cal. 224.
13. Estate of Ryer, 110 Cal. 556. See also 111 Cal. 428; 107 Cal. 160; 105 Cal. 52; 108 Cal. 535; 110 Cal. 12.
14. Green v. Berge, 105 Cal. 52.
15. Warren v. Hopkins, 110 Cal. 506.

therein; but such statutory undertakings may be in the same instrument.[16]

The service of a notice of appeal, if duly made by mail, is complete at the time of a deposit of a copy of the notice in the postoffice.[17]

When the statute authorizes the service by mail, the deposit of the notice need not be in the postoffice where the person serving it resides.[18]

When an appeal is taken from a judgment in an action and from an order denying a new trial in the action, and the undertaking on appeal does not refer to the new trial order, and no separate undertaking be given on the appeal from the order, the appeal from the order will be dismissed, and such dismissal will not be prevented by the filing of a new undertaking in the Supreme Court under the provisions of section 954 of the Code of Civil Procedure.[19]

An appeal from a judgment will not be effectual unless an undertaking on such appeal be given or a deposit made as prescribed by section 941 of the Code of Civil Procedure.[20]

Where an undertaking on appeal is not filed or deposit made within the time prescribed by law, or waived, the appeal is ineffectual for any purpose and will be dismissed.[21]

The time for filing an undertaking on an appeal may be extended not to exceed thirty days by the judge of the trial court under the provisions of section 1054 of the Code of Civil Procedure.[22] The order extending such time, however, must be made before the statutory time to file such an undertaking has expired.

No appeal can be dismissed for the insufficiency of the undertaking thereon, if a good and sufficient undertaking, approved by a justice of the Supreme Court, be filed in the Supreme Court

16. Centerville, etc. Co. v. Bachtold, 109 Cal. 112; Code of Civil Procedure, Secs. 941-947.
17. Brown v. Green, 65 Cal. 221.
18. Luck v. Luck, 83 Cal. 574, overruling Reed v. Allison, 61 Cal. 461, and Murdock v. Clark, 73 Cal. 25.
19. Pacific Paving Co. v. Bolton, 89 Cal. 154.
20. Biagi v. Howes, 63 Cal. 384.
21. Perkins v. Cooper, 87 Cal. 243.
22. Wadsworth v. Wadsworth, 74 Cal. 104.

before the hearing upon the motion to dismiss the appeal.[23] The provisions of that section do not apply to a case in which no undertaking on the appeal had been filed in the court below.

In addition to the undertaking required to make an appeal effectual, the Code of Civil Procedure has provided for the giving of other undertakings and the doing of other acts by an appellant, so that proceedings in the trial court for the enforcement of the judgment would be stayed during the appeal. The provisions for the staying of proceedings in the trial court to enforce a judgment are set forth fully in sections 942, 943, 944 and 945 of the Code of Civil Procedure, and it is provided in section 946 of that code that whenever an appeal is perfected as provided in the preceding sections of that code relative to appeals to the Supreme Court, and the undertakings have been given, and the acts done as required by the provisions of said sections, all further proceedings in the court below upon the judgment or order appealed from or upon the matters embraced therein, are stayed, and property levied on under an execution to enforce the judgment is released from such levy, but the court below can proceed on any other matter embraced in the action and not affected by the order appealed from.

It is further provided in said section 946 that an appeal does not continue in force an attachment, unless an undertaking be executed and filed on the part of the appellant by at least two sureties in at least double the amount of debt claimed by him, that the appellant will pay all costs and damages which the respondent may sustain by reason of the attachment in case the order of the court below be sustained, and unless within five days after entry of the order appealed from the appeal be perfected.

The undertakings prescribed in said sections 941, 942, 943, 944 and 945 of the Code of Civil Procedure may be in one instrument or several at the option of the appellant.[24]

In the cases not provided for in said sections 942, 943, 944, and 945 the perfecting of an appeal by giving an undertaking or making the deposit mentioned in said section 941 stays proceedings in the court below upon the judgment or order appealed

23. Schacht v. Odell, 52 Cal. 447; Code of Civil Procedure, Sec. 954.
24. Code of Civil Procedure, Sec. 947.

from, except when it directs the sale of perishable property, in which case the court below may order the property to be sold and the proceeds thereof to be deposited to abide the judgment of the appellate court. And except also where it adjudges the defendant guilty of usurping or intruding into, or unlawfully holding public office, civil or military, within the state, and except also where the order grants or refuses to grant a change of the place of the trial of an action.[25]

The judge of the trial court can fix the amount of the bond to be given on an appeal from a decree of foreclosure and sale, for waste, use and occupation, and deficiency, and the perfecting of the appeal, and an undertaking given for the amount so fixed, stays proceedings pending the appeal, to enforce the decree for the sale of the property directed by the decree to be sold.[26].

An undertaking given under section 941 of the Code of Civil Procedure is ineffectual for any purpose if it fail to contain a stipulation for the payment of damages and costs in the event of a dismissal of the appeal.[27]

The enforcement of a judgment granting a mandatory injunction is stayed by the perfecting of an appeal from such judgment.[28]

During the pending of an appeal from an order of adjudication of insolvency, the court making such order cannot modify it, and such an appeal stays all proceedings in the court below upon the judgment or order appealed from and upon matters embraced therein.[29]

An appeal from an order for the payment of a family allowance stays all proceedings in the court below under the order appealed from.[30]

It is provided in section 946 of the Code of Civil Procedure that the court below may in its discretion dispense with or limit the security required on an appeal, if the appellant is an executor, or administrator, or trustee, or other person acting in

25. Code of Civil Procedure, Sec. 949.
26. Boob v. Hall, 105 Cal. 413.
27. Duncan v. Times-Mirror Co., 109 Cal. 602.
28. Schwarz v. Superior Court, 111 Cal. 106.
29. Statler v. Superior Court, 107 Cal. 536.
30. Ruggles v. Superior Court, 103 Cal. 125.

another's right; and it is further provided in section 965 of the same code that when an executor, administrator or guardian, who has given an official bond, appeals from a judgment or order of the Superior Court made in the proceedings had upon the estate of which he is executor, administrator or guardian, his official bond shall stand in the place of an undertaking on appeal; and the sureties thereon shall be liable as on such undertaking.

In construing these sections the Supreme Court held that in case of an appeal by heirs of a decedent from an order distributing a portion of the estate to a legatee of the decedent, *the executor of a deceased heir* of such decedent must give an undertaking to make the appeal effectual, and must also give an undertaking to stay the execution of the order appealed from, otherwise the appeal would be dismissed, and the execution of the order would not be stayed.[31]

In the case of Ex parte Oxford, 102 Cal. 656, the Supreme Court held that an administratrix of the estate of a decedent need not give any undertaking on an appeal from the order of the court below in which the administration of the estate was pending, directing her as such administratrix to pay a claim allowed on account of the last illness of her intestate.

The person who was the administrator of a decedent but whose letters of administration as such administrator have been revoked, and who appeals from the order revoking such letters, must given an undertaking on such appeal.[32]

When a defendant is acting officially and a judgment is entered or an appealable order is made against him for his acts in his official capacity, the lower court may, under the provisions of section 946 of the Code of Civil Procedure, in its discretion, dispense with, or limit the security, which otherwise would be required on an appeal by him from such judgment or order.[33]

No written undertaking on an appeal is required to be given by the state, the people of the state, or any state officer appealing in his official capacity on behalf of the state, or by any county, city and county, city or town.[34]

31. Estate of Sterrett, 80 Cal. 63.
32. In re Danielson, 88 Cal. 480.
33. Scheever v. Edgar auditor, 67 Cal. 377.
34. Code of Civil Procedure, Sec. 1058.

The adverse party may except to the sufficiency of the sureties to any undertaking mentioned in section 941, 942, 943, 944 and 945 of the Code of Civil Procedure at any time within thirty days after the filing of such undertaking; and unless they or other sureties within twenty days after the appellant has been served with notice of such exception justify before a judge of the court below or a county clerk, upon five days' notice to the respondent of the time and place of justification, the execution of the judgment, order or decree appealed from is no longer stayed; and in all cases where an undertaking is required on an appeal by any of the provisions of said sections a deposit in the court below to the amount of the judgment appealed from, and three hundred dollars in addition, shall be equivalent to filing the undertaking, and in all cases the undertaking or deposit may be waived by the written consent of the respondent.[35]

The failure of the sureties to the undertaking on an appeal to justify, when excepted to, is no ground for dismissing the appeal but only affects the stay of execution.[36]

The court below has no power to permit a pleading in an action to be amended pending an appeal from the judgment in that action; nor to vacate such judgment after its affirmance by the Supreme Court.[37]

The appeal from a judgment in an action does not divest the trial court in which the judgment was entered of jurisdiction to hear and determine a motion for a new trial made in that action.[38]

A party to an action may have reviewed on an appeal from a judgment against him in the action, the question as to whether the evidence is sufficient to justify the verdict or other decision against him, by preparing and having settled and allowed a bill of exceptions with the required specifications as provided in sections 648, 649, 650, 652 and 653 of the Code of Civil Procedure; but an exception to the decision or verdict on the ground that it is not justified by the evidence will not be

35. Code of Civil Procedure, Sec. 948.
36. Swasey v. Adair, 83 Cal. 136.
37. Kirby v. Superior Court, 68 Cal. 604.
38. Naglee v. Spencer, 60 Cal. 10.

reviewed on an appeal from the judgment unless such appeal is taken within sixty days after the rendition of such judgment.[39]

It was held in Estate of Rose, 80 Cal. 166, that an interlocutory order settling the account of an administrator, but not discharging him from his trust, is not a final judgment within the intent and meaning of section 939, and that in case of the due settlement and allowance of a bill of exceptions specifying the particulars in which the evidence was insufficient to justify the decision, the Supreme Court would consider the evidence, if the appeal was taken within sixty days after the order was *entered* in the minutes of the court, although such appeal was not taken within sixty days after the order was signed by the judge and filed with the clerk of the court.

If the party who excepts to the sufficiency of sureties to an undertaking on an appeal fail to appear at the time fixed for their justification, after his exception to the sufficiency of such sureties, he waives the benefit of his exception if the sureties are present at the time for the purpose of justifying.[40]

The county clerk and a judge of the Superior Court are vested by statute with equal authority as to the justification of sureties to an undertaking on an appeal.[41]

A motion for judgment against the sureties on a *bond* given to stay execution pending an appeal should be denied; such motion should only be granted when a *statutory undertaking* is given on the appeal.[42]

The party against whom judgment is rendered by the trial court, usually before he takes an appeal from the judgment, moves for a new trial, and if the trial court denies his motion, then he takes appeals from the judgment, and from the order of the trial court denying his motion for a new trial. The notices of such appeals may be in one instrument, but there must be in the instrument a notice of an appeal from the judgment, and a separate notice of an appeal from the order denying his motion for a new trial; there need be but one undertaking when the two appeals are so taken together, to make such appeals effectual, but

39. Code of Civil Procedure, Sec. 939; Estate of Robinson, 106 Cal. 498; Fatjo v. Swasey, 111 Cal. 635.
40. Bank of Escondido v. Superior Court, 106 Cal. 43.
41. Boyer v. Superior Court, 110 Cal. 401.
42. Powers v. Chabot, 93 Cal. 266.

care must be taken that such undertaking refers to each of the two appeals and shows that it was given to render each of such appeals effectual.

Such party, however, may appeal from the judgment alone, and during the pendency of that appeal he may, by complying with the statutory provisions relating to such motion, move for a new trial; and if that motion be denied, he then may appeal from the order of the trial court denying that motion.

It has been held that proceedings to enforce the judgment can be stayed, on an appeal from the order denying a new trial, the same as such proceedings could be stayed on an appeal from the judgment.[43]

Sections 939 and 963 of the Code of Civil Procedure state the judgments and orders of the Superior Courts from which appeals can be taken to the Supreme Court, and the times within which such appeals must be taken.

Prior to the taking effect of an act of the legislature approved March 3, 1897, an appeal from a final judgment of a Superior Court might be taken at any time within one year after the entry of such judgment; by the provisions of that act such time is limited to six months. The provisions of said act of March 3, 1897, are not retroactive.

On an appeal from a judgment rendered by the Superior Court on an appeal, or from an order, except an order granting or refusing a new trial, the appellant must furnish the Supreme Court with a copy of the notice of appeal, of the judgment or order appealed from, and of papers used on the hearing in the court below.[44]

On an appeal from an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of appeal of the order appealed from, of the judgment roll, and the affidavits, bills of exception, and statement used on the hearing, unless the motion was made on the minutes of the court, in which case a copy of a statement subsequently prepared, settled and allowed, of the judgment roll, of the order appealed from, and of the notice of appeal, must be furnished.[45]

43. Fulton v. Hanna, 40 Cal. 278.
44. Code of Civil Procedure, Sec. 951.
45. Code of Civil Procedure, Secs. 952, 661.

On an appeal from a final judgment of a Superior Court, the party appealing must furnish the Supreme Court with a copy of the notice of appeal, of the judgment roll, and of any bill of exceptions or statement in the case upon which the appellant relies. Any statement used on a motion for a new trial, or settled after decision of such motion when the motion is made on the minutes of the court, or any bill of exceptions settled as provided by sections 649 and 650 of the Code of Civil Procedure, or used on motion for a new trial, may be used on an appeal from a final judgment equally as upon the order granting or refusing the new trial.[46]

The copies provided for in said sections 950, 951, and 952 of the Code of Civil Procedure must be certified to be correct by the clerk of the trial court, or by the attorneys, and must be accompanied with a certificate of the clerk or attorneys that an undertaking on appeal, in due form, has been properly filed or by a stipulation of the parties waiving an undertaking on the appeal.[47]

If the appellant fails to furnish the requisite papers, the appeal may be dismissed;[48] but no appeal can be dismissed for insufficiency of the undertaking thereon, if a good and sufficient undertaking, approved by a justice of the Supreme Court, be filed in the Supreme Court before the hearing of the motion to dismiss the appeal.[49]

Section 954 of the Code of Civil Procedure, provides for giving a new undertaking on an appeal, on an order of the court from which the appeal was taken, or of a judge thereof, when it appears to the satisfaction of such court or judge that the surety or sureties upon an appeal bond, from any cause, has or have become insufficient.

The Supreme Court has by its rules prescribed that the appellant in a civil action shall within forty days after the appeal is perfected and the bill of exceptions or statement (if there be any) are settled, serve and file the printed transcript of the record duly certified to be correct by the attorneys of the parties, or by

46. Code of Civil Procedure, Sec. 950.
47. Code of Civil Procedure, Sec. 953.
48. Code of Civil Procedure, Sec. 954.
49. Code of Civil Procedure, Sec. 954.

the clerk of the court from which the appeal is taken, and that written evidence of the service upon the adverse party of the transcript shall be filed therewith; and that the time so limited may be extended by stipulation, but shall not be extended by the court more than twenty days; and that such extension of time shall be granted only upon good cause shown by affidavit; and that thirty days after the filing of the transcript, the appellant shall file with the clerk his printed points and authorities, and with it proof of their service upon the attorney or attorneys of each respondent who shall have appeared separately in the Superior Court; and that within thirty days after the service of the appellant's points and authorities the respondent shall file and serve his printed points and authorities; and within ten days after the service of the respondent's points, the appellant may file a reply, and that the time so limited for filing points and authorities shall not be extended except by order of the court upon stipulations of parties, or an affidavit showing good cause therefor, and in no case for more than twenty days, and that no brief shall be filed after oral argument. Unless good cause appear therefor, the appellant will not be allowed to discuss new points in his final brief.[50]

Seventeen copies besides the originals, of the transcript and of points and authorities must be filed with the clerk of the Supreme Court, and copies of all printed papers, points and authorities and briefs filed in the Supreme Court in any matter appealed thereto, must be deposited with the clerk of the court, from which the appeal is taken, to be by him delivered to the judge who presided at the trial of the cause in the lower court.

The parties to an action on an appeal to the Supreme Court may at any time stipulate that the cause be submitted on printed points and authorities on file.

If the transcript of the record or appellant's points and authorities be not filed within the time prescribed by the rules of the Supreme Court the appeal may be dismissed on motion, upon notice given; but if such transcript, or points and authorities although not filed within the time prescribed, be on file at the time such notice is given, that fact will be a sufficient answer to

50. Kahn v. Wilson, 120 Cal. 643.

the motion. If the respondent shall not file his points and authorities within the time allowed therefor, the cause may be submitted for decision upon the motion of the appellant on notice thereof to the respondent.

Rule VI of the Supreme Court prescribes what the evidence shall be, on which a motion to dismiss an appeal is to be made, in the cases in which a transcript on the appeal on file does not contain evidence showing that such appeal should be dismissed, or in case a transcript on the appeal be not filed within the prescribed time.

Copies of the moving papers, except the transcript, shall be served with notice of the motion.

Rules VII, VIII, XI and XII of the Supreme Court relate to the transcript on appeal, the certifying to, and the printing of the same.

Whenever a map or survey forms a part of the transcript, it will not be necessary to furnish more than one copy thereof, which shall be annexed to the transcript filed with and certified by the clerk, to which reference must be made in the other copies of the transcript.

In all cases where a paper or document is required by the rules of the Supreme Court to be printed, it must be printed upon similar paper, and in the same style and form (except the numbering of folios in the margin) as is prescribed for the printing of transcripts. Rule XVIII.

An appeal, or writ of error, may be dismissed at any time, upon and in accordance with the written stipulation of the attorneys of record of the respective parties; and upon and in accordance with such stipulation, the clerk shall enter such dismissal, and the remittitur thereon shall issue in accordance with the terms of such stipulation. Rule XXIV.

Rule XIV provides for the correction of any error or defect in the transcript; and rule XV provides how objections and exceptions to the transcript, statement, the bond or undertaking on appeal, the notice of appeal, or its service, or any technical objection or exception to the record in civil cases, affecting the right of the appellant to be heard on the points of errors assigned which might be cured on suggestion of diminution of

the records, are to be taken, and *when* notice thereof is to be given, and how such objection or exception may be removed or answered. Rule XIX is in relation to the time to be allowed to the attorneys of the respective parties to argue the cause.

A motion to strike out parts of pleadings, and an order denying the same, constitute no part of the judgment roll on an appeal unless so made by a bill of exception.[50a]

In case of the service of a summons by publication, the affidavit of such publication by the printer of a newspaper, his foreman, or principal clerk, is a part of the judgment roll, and if the affidavit be made by the publisher of such newspaper, he is presumed, in the absence of a showing to the contrary, to be its printer; but the affidavit, and order for the publication of the summons, were not before 1895 a part of the judgment roll;[51] but they were made a part of the judgment roll by the statutes of 1895, page 646.

The finding of a trial court that the defendant was duly served with the summons in an action and made default is conclusive unless there be something in some other part of the judgment roll which overcomes or contradicts it.[52]

An order setting aside a default and judgment, and restoring an answer to the files is no part of the judgment roll, unless made so by a bill of exceptions.[53]

An interlocutory judgment is properly a part of the judgment roll.[54]

The appearance of an attorney for a party to an action as provided in section 1014 of the Code of Civil Procedure is no part of the judgment roll.[55]

A stipulation between the attorneys of parties to an action, is no part of the judgment roll, and cannot be considered on an appeal unless incorporated in a bill of exceptions.[56]

Neither a bill of particulars nor the instructions of the court are any part of the judgment roll.[57]

50a. Sutton v. Stephens, 101 Cal. 545.
51. People v. Thomas, 101 Cal. 571.
52. La Fetra v. Gleason, 101 Cal. 248.
53. Von Schmitt v. Von Schmitt, 104 Cal. 547.
54. Packard v. Bird, 40 Cal. 379.
55. Lyons v. Roach, 84 Cal. 27.
56. S. F. Savings Union v. Myers, 76 Cal. 624.
57. Paris v. Raynor, 76 Cal. 647.

A statement of facts when there is a stipulation that the statement may be used by either party in any and all proceedings in the action becomes a part of the judgment roll.[58]

By the amendment to section 670 of the Code of Civil Procedure passed by the legislature of 1895, in case of service of a summons by publication, the affidavit for publication of summons and the order directing the publication of summons must be made a part of the judgment roll.

The Supreme Court will consider on an appeal from a judgment the copies of the bills of exceptions and statements required to be furnished on such appeal by the provisions of section 950 of the Code of Civil Procedure, if so furnished; but will not, however, consider the insufficiency of the evidence to justify the verdict or decision, unless the appeal from the judgment be taken within sixty days after the judgment was rendered.

By said section 670, bills of exceptions, if any, taken and filed before the judgment roll is made up, must be included in the judgment roll.

If no such copies be furnished, the Supreme Court can consider on an appeal from the judgment, only the notice of appeal and the judgment roll.[59]

The insufficiency of the complaint to support the judgment, and whether the court erred in overruling a demurrer to a complaint are matters which can only be considered on an appeal from the judgment.[60]

The ruling of the court below on motion for a judgment, on the pleadings, can only be reviewed on an appeal from the judgment.[61]

The objections to evidence which were overruled by the trial court, will not be considered on an appeal unless the exceptions to such rulings and the evidence, or the substance thereof, be embodied in a bill of exceptions or in a statement.[62]

The report of evidence by a referee, unless embodied in a bill of exceptions and filed, is no part of the judgment roll.[63]

58. Burnett v. Pacheco, 27 Cal. 408.
59. Sichler v. Look, 93 Cal. 600.
60. Bode v. Lee, 102 Cal. 583, 587.
61. Evans v. Paige, 102 Cal. 132.
62. Warren v. McGill, 103 Cal. 155.
63. Lee Sack Sam v. Gray, 104 Cal. 246.

An order granting a motion for a non suit, must be excepted to, and such exception must appear in the stating part of the bill of exceptions or statement as an error in law occurring at the trial and excepted to by the appellant.[64]

A non suit can be properly granted after the evidence on both sides is closed, and there need be no findings in a case of non suit.[65]

Instructions of the court to a jury, if erroneous, are errors in law occurring at the trial, and if excepted to should be embodied in a bill of exceptions as provided in section 650 of the Code of Civil Procedure.[66]

When none of the evidence on the trial of a case is brought up upon an appeal, the judgment will not be reversed if the only error assigned is that of giving or refusing instructions, unless the giving or refusing of such instructions would have been erroneous in any conceivable state of facts.[67]

It was held in Barfield v. South Side I. Co., 111 Cal. 118, that, on an appeal from a judgment, when there was a bill of exceptions on such appeal, the bill of exceptions should be considered on the appeal as to errors in law, although there was no specifications of errors in law, embodied therein. This case overruled the decision of a majority of the court in Miller v. Wade, 87 Cal. 410.

A bill of exceptions must contain all the exceptions taken upon which the party relies.[68]

An order denying a new trial is an order from which an appeal may be taken, and is deemed to have been excepted to,[69] and need not be embodied in a bill of exceptions.[70]

In case of a plea to an amended complaint of the bar of the statute of limitations, and the court finds either for or against such bar, the party against whom such finding is made has the right to and should have the original complaint and the date of its filing embodied in a bill of exceptions.[71]

64. Craig v. Hesperia L. & W. Co., 107 Cal. 675.
65. Toulouse v. Pare, 103 Cal. 251.
66. Southern Pacific Co. v. Superior Court, 105 Cal. 84.
67. Frost v. Grizzly Bluff C. Co., 102 Cal. 525.
68. Code of Civil Procedure, Sec. 650.
69. Code of Civil Procedure, Sec. 647.
70. Southern Pacific R. R. Co. v. Superior Court, 105 Cal. 84.
71. Reddington v. Cornwell, 90 Cal. 50; Dougall v. Schulenberg, 101 Cal. 154.

By Rule XXIX of the Supreme Court, in all cases of appeal to the Supreme Court from the orders of the Superior Courts, the papers and evidence used or taken on hearing of the motion for the orders, must be authenticated by incorporating the same in a bill of exceptions, except when another mode of authentication is provided by law.

Sections 650 and 651 of the Code of Civil Procedure prescribe the proper rule in respect to the preparing, serving settling and allowing of such bill of exceptions.[72]

That rule, however, does not apply when the order appealed from is attacked for matters appearing on its face, or upon the face of the record of which it forms a part.[73]

A stipulation of the respondent on an appeal that the transcript is correct and that the appeal has been duly perfected, does not estop the respondent from moving to dismiss the appeal on the ground that it was not taken in time.[74]

Upon an appeal from a judgment, an order which is by statute subject to a direct appeal, cannot be reviewed.[75]

Evidence read or referred to upon a motion for the order appealed from should be embodied in a bill of exceptions.[76]

An order striking out, or refusing to strike out, a portion of a complaint is not itself appealable, and may be reviewed on an appeal from the final judgment, when there is a bill of exceptions embodying the action of the court.[77]

When it appears from the judgment itself that it was rendered on the pleadings, no bill of exceptions is necessary to establish that fact.[78]

A copy of an order sustaining or overruling a demurrer is a part of the judgment roll;[79] and is deemed excepted to;[80] and if a pleading be demurred to and the demurrer overruled, this

72. Flagg v. Puterbaugh, 98 Cal. 134; Tregambo v. Comanche Co., 57 Cal. 504.
73. Miller v. Lux executors, 100 Cal. 609.
74. Palmado Irr. Dist. v. Rathke, 91 Cal. 538.
75. McCourtney v. Fortune, 42 Cal. 388.
76. Hyde v. Boyle, 93 Cal. 1.
77. Swain v. Burnett, 76 Cal. 300.
78. Weeks v. Garibaldi S. G. M. Co., 73 Cal. 599.
79. Code of Civil Procedure, Sec. 670.
80. Code of Civil Procedure, Sec. 647.

decision of the court can only be reviewed on an appeal from the judgment after the judgment in the action is rendered.[81]

A bill of exceptions is a simple and convenient method of preserving exceptions and bringing up the evidence on appeal, and is equally applicable to any and all kinds of appeals provided for by the code.[82]

There is no direct provision in the Code of Civil Procedure as to how, in some cases, affidavits, depositions and minutes of the court, which were read, or referred to, on the hearing of a motion, are to be authenticated.

If affidavits, papers and evidence be used or taken on the hearing of a motion, there may be a bill of exceptions, to be used on an appeal from an order granting or denying the motion, and if so used, the proper way for authenticating them as having been so used, would be by a bill of exceptions settled and allowed and certified to by the judge who tried the case; and this would be, as is prescribed by Rule XXIX of the Supreme Court.

By the adoption of that rule the Supreme Court has declared that papers or evidence used or taken on the hearing of a motion for an order, must, on an appeal from such order, except where another mode of authentication is provided by law, be authenticated by incorporating them in a bill of exceptions.[83]

Such bill of exceptions would be in addition to the bill of exceptions, or statement, if any, theretofore in the case.

When the material findings of the court below are attacked on the ground of the insufficiency of the evidence to justify them, and the respondent files no brief and makes no oral argument in the case in support of such findings, the Supreme Court has the right to presume that the evidence is insufficient to justify such findings.[84]

When all the matters included in an appeal have been settled and disposed of, subsequent to the appeal, the Supreme Court on a proper showing of the existence of such fact, will dismiss the appeal.[85]

81. Ashley v. Olmstead, 54 Cal. 616.
82. Brandt v. Clark, 81 Cal. 634.
83. Somers v. Somers, 81 Cal. 608, 614.
84. Richter v. Fresno C. & I. Co., 101 Cal. 582; approved in Kelly v. Bradbury, 104 Cal. 237; approved in Mountain T. G. M. Co. v. Bryan, 111 Cal. 36.
85. In re Treadwell, 111 Cal. 189; Bank of Martinez v. Jahn, 104 Cal. 238; Estate of Baby, 87 Cal. 200.

A statement of the case *used* on the hearing of a motion for a new trial is part of the record upon which an appeal from the judgment may be heard.[86]

A statement not used on a motion for a new trial cannot be used on an appeal from the judgment.[87]

The Supreme Court can after a remittitur is issued, modify its order dismissing an appeal.[88]

A judgment or order will be affirmed when no brief or points are filed by the appellant, and no oral argument is made by him.[89]

If the appellant filed a brief, and it is filed after the time prescribed by the rules for such filing, the Supreme Court in its discretion may refuse the appellant to make an oral argument.[90]

On an appeal from a judgment, the Supreme Court will consider the judgment roll alone, unless there be a bill of exceptions or statement in the case on which the appellant relies; and if there be, the Supreme Court will consider such statement or bill of exceptions as well as the judgment roll.[91]

Although specifications of errors in law excepted to by the defendant need not be inserted in the bill of exceptions yet it is the duty of counsel specifically to point out and discuss such claimed errors in his brief or points and authorities.[92]

On an appeal from an order denying a new trial, the court cannot consider errors apparent on the face of the judgment.[93]

Upon an appeal from an order granting a new trial, the court will review the entire record upon which the order was based, and is not confined in its review to the grounds stated by the court as the grounds on which the new trial was granted.[94]

If a new trial be asked for and granted on the ground that the contract sued on is void because against public policy, and that the court erred in not granting a motion for a non suit, and

86. Craig v. Fry, 68 Cal. 363; 60 Cal. 279.
87. Jue Fook Sam v. Lord, 83 Cal. 159.
88. Romine v. Cralle, 80 Cal. 626.
89. Drexler v. Seal Rock Co., 78 Cal. 624.
90. Campodonico v. Oregon I. Co., 85 Cal. 218.
91. Bedan v. Turney, 99 Cal. 649.
92. West v. Crawford, 80 Cal. 20.
93. Estate of Westerfield, 96 Cal. 113; Wheeler v. Bolton, 92 Cal. 159.
94. Kauffman v. Maier, 94 Cal. 269.

a copy of the contract is set out in the complaint, the Supreme Court on an appeal from the order granting a new trial, can consider the contract so set out in the complaint.[95]

A consent to a judgment, is a waiver of errors, by the party consenting thereto, and such judgment will be affirmed on an appeal by the court as to him.[96]

An objection that certain findings were not within the issues will not be considered on an appeal, if no objections to the admission of evidence supporting such findings were made at the trial.[97]

But unless the record shows that the action was actually tried on the theory that there were certain issues of fact to be tried, and pertinent evidence was intentionally introduced on such theory, the Supreme Court on an appeal will consider the question as to whether such findings were as to issues of fact raised by the pleadings.[98]

An appellant cannot avail himself on an appeal, of exceptions taken by other parties in the court below who did not appeal.[99]

A judgment will not be reversed on an appeal by reason of errors of the court below which could not have affected the result.[100]

A judgment will not be reversed by reason of a failure to find on certain issues in the action, when such findings, if made, would not have effected the result.[101]

A judgment will not be reversed because of errors which could not have prejudiced the appellant.[102] Unless the evidence be all documentary, the Supreme Court will not interfere with the discretion of the trial court, in the following cases, unless it plainly appears that there has been an abuse of such discretion, namely; in granting or refusing a continuance;[103] in the dissolv-

95. Alpers v. Hunt, 86 Cal. 78.
96. Jackson v. Brown, 82 Cal. 275.
97. Horton v. Dominguez, 68 Cal. 642.
98. White v. Merrill, 82 Cal. 14.
99. Emeric v. Alvarado, 90 Cal. 444, 446.
100. Estate of Spencer, 96 Cal. 448.
101. Diefendorff v. Hopkins, 95 Cal. 348.
102. Zumwalt v. Dickey, 92 Cal. 156.
103. Barnes v. Barnes, 95 Cal. 171.

ing of attachments;[104] in the dismissal of actions for the want of prosecution;[105] in the allowing of amendments to pleadings;[106] in the granting or refusing to grant a change of the place of trial on the ground of the convenience of witnesses;[107], [108]; in allowing a renewal of motion once denied; [109] in granting, continuing or dissolving injunctions;[110] in the reopening of a case;[111] in the cross examination of witnesses;[112] in the allowing of alimony;[113] and of counsel fees;[114] in the granting or refusing to grant a motion to set aside a default;[115] in the allowance as costs, of expenses and disbursements upon the trial of an action;[116] in the granting or denying a motion for a new trial when the ground of the motion is the insufficiency of the evidence to sustain the decision of the court or the verdict of a jury;[117] in the granting or denying a motion for a new trial on the ground of newly-discovered evidence;[118] in the granting or denying a motion for a new trial on the ground of accident or surprise which ordinary prudence could not have guarded against;[119] in the granting or refusing to grant a motion for a new trial on the ground of the misconduct of the jury, when the evidence as to such claimed misconduct is conflicting.[120] In case of an abuse of this discretion by the trial court, and such abuse be shown by the record on an appeal, this abuse of such discretion will be corrected by the Supreme Court.

The Supreme Court will not grant a new trial on the ground of excessive damages unless it is plain that the verdict

104. Fuller v. Arnold, 93 Cal. 168.
105. 63 Cal. 81.
106. Graham v. Stewart, 68 Cal. 374.
107. Clanton v. Rufner, 78 Cal. 268.
108. Hastings v. Killer, 69 Cal. 606.
109. Kenny v. Kelleher, 63 Cal. 442.
110. Porter v. Jennings, 89 Cal. 440.
111. Miller v. Sharpe, 49 Cal. 233.
112. Silvarer v. Hansen, 77 Cal. 579.
113. Langan v. Langan, 91 Cal. 654.
114. White v. White, 78 Cal. 105.
115. Williamson v. Cummings R. D. Co., 95 Cal. 652.
116. Barnhart v. Kron, 88 Cal. 448.
117. Savage v. Sweeny, 63 Cal. 340.
118. Hobler v. Cole, 49 Cal. 250.
119. Moore v. L. A. Infirmary, 49 Cal. 670; Nooney v. Mahoney, 30 Cal. 226.
120. People v. Dye, 62 Cal. 523.

was not the result of the fair and honest judgment of the jury.[121]

An order of the lower court granting a new trial will be sustained, if the record on appeal shows that there are errors in law occurring at the trial and excepted to by the appellant, although the court in granting a new trial expressly based the order on the ground that the decision was against law.[122]

A party cannot allow evidence to be introduced without objection, and on an appeal make an objection which might have been obviated if he had made it when the evidence was offered.[123]

Objections to the pleadings on the ground that the statements therein are defective, unless so defective that they do not state a cause of action, or a defense, cannot be raised for the first time on an appeal to the Supreme Court from the judgment.[124]

The Supreme Court will not consider an objection raised on an appeal, unless such objection was raised in the lower court, when the objection is such that it could have been obviated in the lower court, if it had been raised therein.[125]

A ruling of the lower court will not be considered on an appeal to the Supreme Court unless there was an objection and exception to such ruling.[126]

When the evidence is substantially conflicting and the evidence is sufficient to justify and support a finding of the court or a verdict of the jury in favor of a party to an action, the Supreme Court will not reverse a judgment based on such findings or verdict.[127]

The Supreme Court will not interfere with the verdict of a jury on the ground of excessive damages unless the verdict be so plainly and outrageously excessive as to suggest at the first

121. Swain v. Fourteenth S. R. R. Co., 93 Cal. 179.
122. Shanklin v. Hall, 100 Cal. 26.
123. Shain v. Sullivan, 106 Cal. 209.
124. Treanor v. Houghton, 103 Cal. 53.
125. Estate of Robinson, 106 Cal. 493, and 104 Cal. 344; 103 Cal. 53; 103 Cal. 670; 101 Cal. 164, 532; 106 Cal. 208; 101 Cal. 585; 102 Cal. 583; 104 Cal. 570.
126. Dickinson v. Dickinson, 108 Cal. 351, and 104 Cal. 661; 110 Cal. 682; 103 Cal. 7.
127. Mahan v. Wood, 105 Cal. 12, and 105 Cal. 102; 106 Cal. 190; 103 Cal. 624, and numerous other cases.

blush, passion or prejudice or corruption on the part of the jury.[128]

All presumption on an appeal are in favor of the judgment, and of the rulings and correctness of the proceedings in the trial court, when the record shows nothing to the contrary.[129]

The effect of an unqualified reversal of a judgment is to remand the cause for a new trial.[130]

Error in the admission of evidence is ground for reversal, unless the appellate court can see from the record, that the appellant was not injured by such error.[131]

If the justices of the Supreme Court qualified to sit and act in a case on appeal be equally divided in opinion as to whether the judgment appealed from should be reversed or affirmed, such judgment should be affirmed.[132]

A reversal of an order of the lower court refusing to grant a new trial and an order of the Supreme Court remanding the cause for a new trial vacates the judgment in the action.[133]

A new trial may be granted by the Supreme Court on an appeal from an order refusing to grant such new trial, notwithstanding an affirmance of the judgment in the action, on an appeal from such judgment alone.[134]

It is a maxim never to be disregarded that general expressions in every opinion of the Supreme Court are to be taken in connection with the case, in which such expressions are used.[135]

The decision of the Supreme Court on an appeal becomes the law of the case as to whatever was necessarily involved in the decision on the facts of the case as presented on that appeal.[136]

If such decision, through inadvertence states two principles

128. Howland v. Oakland C. St. Ry. Co., 110 Cal. 523.
129. Von Schmitt v. Von Schmitt, 104 Cal. 547, and 103 Cal. 7; 105 Cal. 41; 105 Cal. 646; 101 Cal. 390; 109 Cal. 437.
130. Falkner v. Hendy, 107 Cal. 54.
131. In re Kennedy, 104 Cal. 432.
132. Frankel v. Deldeshelmer, 93 Cal. 73.
133. Fulton v. Hanna, 40 Cal. 278.
134. Sharon v. Sharon, 79 Cal. 691.
135. Estate of Johnson, 98 Cal. 532.
136. Polack v. McGrath, 38 Cal. 666; Eversdon v. Mayhew, 85 Cal. 1.

of law, one of which is inconsistent with the other, neither of the principles so stated constitutes the law of the case.[137]

When the record on the second appeal presents a state of facts different from the state of facts presented by the record on the former appeal, the decision of the Supreme Court on such former appeal is not the law of the case in respect to such different state of facts, or different questions of law, shown by the record on such second appeal, and these will be considered as fully as they would have been, if presented on a first appeal.[138]

The dismissal of an appeal by the Supreme Court is in effect an affirmance of the judgment or order appealed from, unless the dismissal is expressly made without prejudice to another appeal.[139]

Upon an appeal from a judgment, the court may review the verdict or decision, and any intermediate order or decision excepted to, which involves the merits or necessarily affects the judgment, except a decision or order from which an appeal might have been taken.[140]

When the judgment or order is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment or order, so far as such restitution is consistent with the protection of a purchaser of property at a sale ordered by the judgment, or had, under process issued upon the judgment, on the appeal from which the proceedings were not stayed; and for relief in such cases the appellant may have his action against a respondent enforcing the judgment for the proceeds of the sale of the property after deducting therefrom the expenses of the sale.

When it appears to the appellate court that the appeal was made for delay it may add to the costs such damages as may be just.[141]

137. Gage v. Downey, 94 Cal. 241.
138. Klauber v. San Diego St. Car Co., 98 Cal. 105.
139. Code of Civil Procedure, Sec. 955.
140. Code of Civil Procedure, Sec. 956.
141. Code of Civil Procedure, Sec. 957.

CHAPTER XXXVIII.

OF WRITS OF ERROR TO THE SUPREME COURT OF A STATE FROM THE SUPREME COURT OF THE UNITED STATES.

There are some cases in which the judgment of the Supreme Court of a state on an appeal, are not absolutely final, until the time has passed for the issuance of writs of error from the Supreme Court of the United States, for the purpose of having reviewed, in that high tribunal, such judgments of the Supreme Court of a state.

By the provisions of article III, section 2, of the constitution of the United States, the Supreme Court of the United States has appellate jurisdiction both as to law and fact, with such exception and under such regulations as the congress shall make in all cases in law and equity arising under the constitution and the laws of the United States, and treaties made or which shall be made under their authority, to controversies in which the United States shall be a party, to controversies between citizens of the same state, claiming land under grants of different states, and between the citizens of a state and foreign states' citizens and subjects.

Congress has enacted that a final judgment or decree in any suit in the highest court of a state, in which a decision in the suit could be had, where is drawn in question the validity of a treaty, statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the constitution, or any treaty, statute of, or commission held, or authority exercised,

under the United States and the decision is against the title, right privilege or immunity specially set up or claimed, by either party, under such constitution, treaty, statute, commission or authority, may be examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed on in a court of the United States; and the proceedings upon the reversal shall be the same, except that the Supreme Court may at its discretion proceed to a final decision of the case and award execution, or remand the same to the court from which it was so removed.

On such writ of error the Supreme Court may (reaffirm) reverse, modify, or affirm the judgment or decree of such state court, and may at its discretion award execution or remand the same to the court from which it was removed, by the writ.[1]

Writs of error from the Supreme Court to a state court must be brought within two years after the entry of the judgment decree or order of the state court sought to be reviewed by the writ, saving to persons under a disability by reason of infancy, insanity, or imprisonment, a like period of two years, to bring such writ after such disability is removed.[2]

A writ of error returnable to the Supreme Court of the United States may be issued as well by the clerks of the Circuit Courts of the United States under the seal thereof as by the clerk of such Supreme Court.[3]

When the writ is issued to a state court, the chief justice, judge, or chancellor of that court, or a justice of the Supreme Court of the United States, if of opinion, judicially, that such writ should be allowed, is to sign a citation to the defendant named in the writ and the signing of such citation is in effect an allowance of the writ.[4]

A judge of a district court of the United States has no authority in law to sign such citation, nor to take and approve

1. U. S. Rev. Statutes, Sec. 709.
2. U. S. Rev. Statutes, Secs. 1003, 1008.
3. U. S. Rev. Statutes, Sec. 1004.
4. U. S. Rev. Statutes, Sec. 999; Greely v. Townsend, 25 Cal. 604.

of security, in order to make the writ of error operate as a supersedeas.[5]

The judge or justice who allows the writ by signing the citation must take good and sufficient security that the party applying for the writ who is designated as the plaintiff in error, shall prosecute his writ to effect and if he fail to make his plea good, he shall answer all damages and costs, when the writ is a supersedeas and stays execution; and all costs only, when it is not a supersedeas.[6]

There shall be annexed to and returned with such writ of error an authenticated transcript of the record, an assignment of errors, and a prayer for reversal, with the citation to the adverse party, who is designated as the defendant in error.[7] When appellant jurisdiction has been conferred by the constitution on the Supreme Court of this state, then, in a case in which such jurisdiction has been conferred and for which the legislature has not provided for an appeal, such case may be brought before the higher court for review by a writ of error.[8]

It is not my purpose in this work to treat of civil remedies by writs of error returnable to the Supreme Court of the United States, and further notice of such writs of error are outside of the purpose for which this work was written.

5. Tompkins v. Mahoney, 32 Cal. 231.
6. U. S. Rev. Statutes, Sec. 1009.
7. U. S. Rev. Statutes, Sec. 997.
8. Ex parte Thistleton, 52 Cal. 220.

CHAPTER XXXIX.

OF MOTIONS, ORDERS AND SOME GENERAL PROVISIONS AS TO CIVIL REMEDIES.

Every direction of the court or judge made or entered in writing and not included in a judgment is denominated an order. An application for an order is a motion.[1]

An order made out of court without notice to the adverse party may be vacated or modified without notice, by the judge who made it; or may be vacated or modified on notice in the manner in which other motions are made.[2]

If an application for an order made to a judge of a court in which the action or proceedings is pending is refused in whole or in part, or is granted conditionally, no subsequent application for the same order shall be made to any court commissioner, or any other judge, except of a higher court; but this does not apply to motions refused for informality in the papers or proceedings necessary to obtain the order, or to motions refused with liberty to renew the same.[3]

A judge who has denied a motion in whole or in part may grant leave to renew such motion.

Motions must be made in the county, or city and county, in which the action is pending. Orders made out of court, may be made by the judge of the court, in any part of the state.[4]

When a written notice of a motion is necessary, such notice must be given within the time and as prescribed by section 1005 of the Code of Civil Procedure. In all cases, however, the court

1. Code of Civil Procedure, Sec. 1003.
2. Code of Civil Procedure, Sec. 937.
3. Code of Civil Procedure, Sec. 182.
4. Code of Civil Procedure, Sec. 1004.

or a judge thereof, may prescribe a time for giving such notice shorter than that prescribed by said section.[5]

When notice of a motion is given, or an order to show cause is made, to be tried before the judge out of court, and the judge is unable to hear the parties, he may make an order transferring the hearing to some other judge before whom the matter might originally have been brought.[6]

Whenever an order for the payment of a sum of money is made by a court pursuant to the provisions of the Code of Civil Procedure, it may be enforced in the same manner as if it were a judgment.[7]

Notices must be in writing, and notices and other papers may be served upon the party or his attorney in the manner prescribed in sections 1005, 1011, 1012 and 1013 of the Code of Civil Procedure.[8]

In making such service great care should be taken to make the service as prescribed by such sections, and in preparing the affidavit of such service, unless the service be admitted, the affidavit must show that the service was so made.[9]

A service by mail is complete (if the notice be properly served by mail, and in the manner prescribed in said sections of the Code of Civil Procedure) when the notice is deposited in the postoffice; but if within a given number of days after such service, a right may be exercised or act is to be done by the adverse party, the time within which such right is to be exercised or act be done is extended one day, for every twenty-five miles distance between the place of the deposit and the place of the address.

Such extension, however, is not to exceed ninety days in all.[10]

A defendant appears in an action when he answers, demurs or gives to the plaintiff notice of his appearance, or when an attorney gives notice of appearance for him. After appearance a defendant, or his attorneys, is entitled to notice of all subsequent proceedings of which notice is required to be given. But

5. Code of Civil Procedure, Sec. 1005.
6. Code of Civil Procedure, Sec. 1006.
7. Code of Civil Procedure, Sec. 1007.
8. Code of Civil Procedure, Sec. 1010.
9. Heinlen v. Heilbron, 94 Cal. 636; Moore v. Besse, 85 Cal. 184.
10. Code of Civil Procedure, Sec. 1013.

where a defendant has not appeared, service of notice of papers need not be made upon him unless he is imprisoned for want of bail.[11]

When a plaintiff or a defendant who has appeared, resides out of the state, and has no attorney in the action or proceedings, *the service may be made on the clerk for him.*

But in all cases where a party has an attorney in the action or proceeding, the service of papers when required, must be upon the attorney instead of the party, except of writs, subpoenas, and other process issued in the suit, and of papers to bring him into contempt.[12]

Section 1017 of the Code of Civil Procedure, provides for the transmission by telegraph, of any summons, writ, or order in a civil suit or proceeding, and of all other papers requiring service, and for the service of a telegraphic copy thereof, and how the evidence showing such service is to be made.

An affidavit, notice or other paper, without the title of the action or proceeding in which it is made, or with a defective title, is as valid and effectual for any purpose, as if duly entitled, if it intelligibly refer to such action or proceeding.[13]

An affidavit is a written declaration under oath made without notice to the adverse party.[14]

Section 2009 to section 2015 of the Code of Civil Procedure, both sections included, provide for what purposes affidavits can be used, by whom they are to be made, and how the making of such affidavits is to be authenticated.

It is provided in section 2010 of that code that evidence of the publication of a document or notice required by law or by an order of a court or judge to be published in a newspaper, may be given by the affidavit of the printer of the newspaper or his foreman or principal clerk, annexed to a copy of the document or notice, specifying the times when, and the paper in which the publication was made.

Successive actions may be maintained upon the same con-

11. Code of Civil Procedure, Sec. 1014.
12. Code of Civil Procedure, Secs. 1015, 1016.
13. Code of Civil Procedure, Sec. 1046.
14. Code of Civil Procedure, Sec. 2003.

tract or transaction whenever, after the former action, a new cause of action arises therefrom.[15]

If an original pleading or paper be lost, the court may authorize a copy thereof to be filed and used instead of the original.[16]

This can be done upon motion based on affidavits showing what the lost paper contained and upon proper notice of such motion to the adverse party.[17]

An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appealing has passed, unless the judgment is sooner satisfied.[18]

Whenever two or more actions are pending at one time between the same parties and in the same court upon causes of action which might have been joined, the court may order the actions to be consolidated.[19]

An action may be brought by one person against another for the purpose of determining an adverse claim, which the latter makes against the former for money or property upon an alleged obligation; and also against two or more persons for the purpose of compelling one to satisfy a debt due to the other, for which the plaintiff is bound as a surety.[20]

When there are three referees or three arbitrators all must meet, but two of them may do any act which might be done by all.[21]

It is provided in section 15 of the Code of Civil Procedure that words giving a joint authority to three or more public officers or other persons are construed as giving such authority to a majority of them, unless it is otherwise expressed in the act giving the authority.

If an action be brought against a sheriff for an act done by virtue of his office, and he give written notice thereof to the sureties on any bond of indemnity received by him, the judg-

15. Code of Civil Procedure, Sec. 1047.
16. Code of Civil Procedure, Sec. 1045.
17. People v. Casalis, 27 Cal. 522.
18. Code of Civil Procedure, Sec. 1049.
19. Code of Civil Procedure, Sec. 1048.
20. Code of Civil Procedure, Sec. 1050.
21. Code of Civil Procedure, Sec. 1053.

ment recovered shall be conclusive evidence of his right to recover against such sureties, and the court may on motion, upon notice of five days, order judgment up against them for the amount so recovered, including costs.[22]

Section 1056 of the Code of Civil Procedure provides for corporations, organized under the laws of this or any other state for the purpose of being a surety, becoming a surety on bonds and undertakings, and for such corporation being accepted as a surety on bonds and undertakings required to be given under the laws of this state.

It is provided in section 1057 of the same code that in any case where an undertaking or bond is authorized or required by any law of this state, the officer taking the same must (except the surety be a corporation accepted as a surety under the provisions of said section 1056), require the sureties to accompany it with an affidavit that they are each residents and householders (or freeholders) within the state and are each worth the sum specified in the undertaking, or bond, over and above all his just debts and liabilities, exclusive of property exempt from execution; but when the amount specified in the undertaking or bond exceeds three thousand dollars, and there are more than two sureties thereon, they may state in their affidavits that they are severally worth an amount less than the amount specified in the undertaking or bond, if the whole amount be equal to that of two sufficient sureties.

In any civil action or proceeding within the state of California wherein the state, or the people of the state is a party *plaintiff* or any state officer in his official capacity, or in behalf of the state, or any county, city and county, city or town, is a party plaintiff or defendant, no bond, written undertaking, or security, can be required of the state, or the people thereof, or any officer thereof, or of any county, city and county, city or town; but on complying with the other provisions of the Code of Civil Procedure, the *state,* or the *people thereof* or any *state officer* acting in his official capacity, have the same rights, remedies and benefits, as if the bond, undertaking or security were

22. Code of Civil Procedure, Sec. 1055.

given and approved as required by the Code of Civil Procedure.[23]

Whenever any surety on an undertaking on appeal, executed to stay proceedings on a money judgment, pays the judgment, either with or without action, after its affirmation by the appellate court, he is substituted to the right of the judgment creditor, and is entitled to control, enforce and satisfy such judgment in all respects as if he had recovered the same.[24]

The Code of Civil Procedure, sections 989-994, provides for the proceedings against one or more joint debtors upon an obligation, who were not originally served with the summons issued in an action on such obligation, and who did not appear in the action after judgment against one or more joint debtors on such obligation who were served with the summons in such action or appeared therein, for the purpose of having the joint debtors, against whom such judgment was not rendered, bound by such judgment.

23. Code of Civil Procedure, Sec. 1058.
24. Code of Civil Procedure, Sec. 1059.

CHAPTER XL.

OF CIVIL REMEDIES IN JUSTICES' COURTS AND OF APPEALS THEREFROM.

Justices' courts are constitutional courts, but the legislature must fix by law the powers, duties and responsibilities of justices of the peace; such powers are not, however, to trench upon the jurisdiction of the several courts of record, except the said justices shall have concurrent jurisdiction with the Superior Court of their county in cases of forcible entry and detainer where the rental value does not exceed twenty-five dollars per month, and where the whole amount of damages claimed does not exceed two hundred dollars, and in cases to enforce and foreclose liens on personal property when neither the amount of the lien nor the value of the property amounts to three hundred dollars.[1]

Under these constitutional provisions the legislature of California has fixed the subject matters over which the civil jurisdiction of justices' courts extend, and the concurrent jurisdiction, in some cases of such courts with the Superior Courts.[2]

The legislature has also fixed the jurisdiction of such courts as to the parties defendants therein, and how such jurisdiction is acquired, and has prescribed the proceedings in such courts, in the Code of Civil Procedure, section 832 to section 926, both sections included, and which sections are contained in title XI of part II of that code.

The provisions of such sections are clearly stated, and but little difficulty should be experienced by justices of the peace, or by litigants in justices' courts, if they carefully read and follow such provisions, either in administering or obtaining justice in

1. California Constitution, Art. VI, Sec. 11.
2. Code of Civil Procedure, Secs. 112, 113.

such courts, and if there should be any failure to obtain justice in such courts, a plain, speedy and adequate remedy is given by an appeal to the Superior Court of the county in which the justices' court is held. The rules of evidence are the same in all courts, but neither the justices of the peace nor litigants in justices' courts, should overlook the declaration of the legislature that justices' courts being courts of peculiar and limited jurisdiction, only those provisions of the Code of Civil Procedure, which are in their nature applicable to the organization powers and course of proceedings in justices' courts, or which have been made applicable by special provisions in said title XI of the Code of Civil Procedure, are applicable to justices' courts and the proceedings therein.[3]

The legislature has provided in sections 974 to 980, both sections included, of the Code of Civil Procedure for an appeal from the judgment of a justice's court to the Superior Court of the county in which such justice's court is held.

Care is to be exercised in taking such appeal to follow the provisions of the Code of Civil Procedure in relation thereto, instead of following provisions relative to appeals from the judgment or order of a Superior Court to the Supreme Court.

A justice's court has no jurisdiction to set aside a judgment rendered after a regular trial in such justice's court.[4]

If the justice's court attempts to try an action without jurisdiction so to do, such attempted trial is no trial, and if on such attempted trial the justices of the peace enter in his docket a judgment in form, the judgment so entered in form as a judgment is a nullity, and does not prevent the justice of the peace when he has jurisdiction to try the action, from trying the action, and such trial would not be a new trial of the action, since such attempted trial of the action by a justice of the peace is a nullity.

On an appeal from a judgment of a justice's court heard on a statement of a case the Superior Court may review all orders affecting the judgment appealed from, and may set aside or confirm or modify any or all proceedings subsequent to, and depend-

3. Code of Civil Procedure, Sec. 925; Weimmer v. Sutherland, 74 Cal. 341.
4. Heinlen v. Phillips, 88 Cal. 557.

ent upon such judgment, and may, if necessary or proper, order a new trial.

When the action is tried anew on an appeal, the trial must be conducted in all respects as other trials in the Superior Court.[5]

The provisions of the Code of Civil Procedure as to changing the place of trial in the Superior Court, are applicable to trials on appeal in the Superior Court.[6]

The powers conferred on justice's courts by statute must be in substance pursued, and the provisions of section 850 of the Code of Civil Procedure providing that a justice of the peace must notify the parties who have appeared in an action in that court of the day fixed for trial is imperative, and a judgment entered without such notice having been given is a nullity. Such notice should be in writing and form a part of the record; and there should be an entry thereof in the justice's docket.[7]

A party relying upon or claiming any right under a judgment of a justice's court must affirmatively show its jurisdiction to render the judgment.[8]

If such jurisdiction depends on the fact of the residence of the defendant in the township of such justice's court, that fact may be shown by parol evidence, and need not be shown by the records of the justice's court.[9]

The return of a constable showing the service of the summons on the defendant in an action in a justice's court in the township of such justice's court is prima facie evidence that such defendant was a resident of such township at the time the action was commenced.[10]

A justice's court has no jurisdiction to try an action for the recovery of personal property when the complaint alleges that the value of such property amounts to or exceeds three hundred dollars.[11]

A judgment rendered by a justice's court on a promissory

5. Code of Civil Procedure, Sec. 980.
6. Code of Civil Procedure, Sec. 980.
7. Jones v. Justice's Court, 97 Cal. 523.
8. Eltzroth v. Ryan, 80 Cal. 135.
9. Jolley v. Foltz, 34 Cal. 321.
10. Fagg v. Clements, 16 Cal. 389.
11. Shealor v. Superior Court, 70 Cal. 564.

note for a sum amounting to or exceeding three hundred dollars, exclusive of interest and costs, is void.[12]

A justice's court has no jurisdiction of any case at law which involves the title or possession of real property or the legality of any tax, impost, assessment, toll or municipal fine, or in any case in which the demand exclusive of interest, or the value of the property in controversy amounts to three hundred dollars or over, or in any action in which the subject of litigation is not capable of pecuniary estimation, or in any case in equity except it be an action in equity to enforce a lien on personal property, when neither the amount of the lien nor the value of the property amounts to three hundred dollars, or, in actions of forcible entry and detainer, unless the rental value of the property does not exceed twenty-five dollars a month and the whole damages claimed do not exceed two hundred dollars. In such actions in equity and forcible entry and detainer, justice's courts and Superior Courts have concurrent jurisdiction.

In an action to recover the possession of personal property the value of the property is the test by which the jurisdiction of the justice's court is determined, and if such value is alleged in the complaint to be three hundred dollars or more the judgment of the justice's court in such action is void.[13]

In an action to recover judgment for money, the amount of money exclusive of interest demanded in the complaint is the test of the jurisdiction of a justice's court to try and determine such action.[14]

In this last cited case it was held that the cost of an action constituted no part of the amount in controversy, and that in an action in a justice's court the defendant could set up only such a counter-claim as he could have sued on in a justice's court.

The legislature cannot confer equity power on a justice's court except as provided in article VI, section II of the constitution above cited.[15]

It is provided in section 838 of the Code of Civil Procedure that parties to an action in a justice's court cannot give evidence

12. Reed v. Bernal, 40 Cal. 628.
13. Shealor v. Superior Court, 70 Cal. 564.
14. Reed v. Bernal, 40 Cal. 628; Dashiell v. Slingerland, 60 Cal. 653; Maxfield v. Johnson, 30 Cal. 545.
15. Sutherland v. Sweem, 53 Cal. 48; Young v. Wright, Jr., 52 Cal. 407.

upon any question which involves the title or possession of real property, or the legality of any tax, impost, assessment, toll or municipal fine, and that no issue presenting such question can be tried by such court, and if it appear from the answer of the defendant, verified by his oath, that the determination of the action will necessarily involve the question of title, or possession to real property, or the legality of any tax, impost, assessment, toll or municipal fine, the justice must suspend all further proceedings in the action, and certify the pleadings, or if the pleadings are oral, a transcript of the same from his docket to the clerk of the Superior Court of the county, and from the time of filing such pleadings or transcript with the clerk, the Superior Court shall have over the action the same jurisdiction as if it had been commenced therein.[16]

Section 92 of the same code prescribes how such pleadings and transcripts shall be certified from a justice's court of a city and county containing over one hundred thousand inhabitants.

A justice of the peace has jurisdiction of an action for damages for trespass on real estate when the right of possession of the premises is not put in issue by the pleadings or controverted on the trial.[17]

A justice court has jurisdiction of an action for a penalty given by statute when the amount of the penalty demanded is less than three hundred dollars.[18]

The question of the legality of any tax, impost, assessment, toll or municipal fine cannot be raised in a justice's court unless by an answer on oath as provided in section 838 of the Code of Civil Procedure, and unless so raised no evidence as to such legality can be received on the trial of the action, either in the justice's court nor on an appeal to the Superior Court.[19]

The question as to whether the right of possession of or title to real estate is involved in an action in a justice's court should be raised by the answer of the defendant under oath, as provided in said section 838, and unless so raised, or the statement of the cause of action shows that there was a question of title or the

16. Code of Civil Procedure, Sec. 838.
17. Cornett v. Bishop, 39 Cal. 319; Livingston v. Morgan, 53 Cal. 23.
18. Thomas v. Justice Court, 80 Cal. 40.
19. Williams v. McCartney, 69 Cal. 556.

right of possession of real estate involved in the action, or if the question of title comes incidentally in question, the justice's court has jurisdiction to try the action, if the amount sought to be recovered in the action is less than three hundred dollars.[20]

The word "assessment" used in section 5, article VI of the constitution, and in said section 838 of the Code of Civil Procedure does not include assessments made by a private corporation under section 330 of the Civil Code, and a justice of the peace cannot under the provisions of said section 838, transfer an action of which that court had jurisdiction to hear and determine to a Superior Court to be tried in that court.[21]

The jurisdiction of the former district court to try an action transferred to it from a justice's court under said section 838 is special, and the action must be tried or determined in the district court, upon the issues raised in the pleadings made in the justice's court.[22]

There is no provision in the Code of Civil Procedure for transferring any action commenced in a police court to a Superior Court for trial.[23]

A justice court cannot transfer an action to a justice's court of another county for trial. If an action be brought in a justice's court, and the defendant resides in another county and wishes the action tried in the county of his residence, he must, when he answers or demurs to the complaint in the action, file the requisite affidavits and demand for the trial of the action in the county of his residence, and unless he does so he cannot have the action tried in the county of his residence, although he files in the justice's court his answer under oath as required under such section 838 of the Code of Civil Procedure for having the pleadings certified to a Superior Court for a trial of the action.[24]

When a county by ordinance imposes license taxes, and in such ordinance provides that an action to collect such taxes shall be commenced in the name of the people, such action must be

20. Schroeder v. Wittram, 66 Cal. 686.
21. Arroyo D. & W. Co. v. Superior Court, 92 Cal. 47.
22. City of Santa Cruz v. Santa Cruz R. R. Co., 56 Cal. 148.
23. Same case, p. 148.
24. Powell v. Sutro, 80 Cal. 559.

commenced in the name of the people, and if, in an action commenced in a justice's court to collect such license tax, it appear by the verified answer of the defendant that the action would necessarily involve the legality of the tax, the justice should suspend proceedings in the action and certify the pleadings to the Superior Court of the county.[25]

When the jurisdiction of a court depends on a fact that is litigated, and such fact is adjudged in favor of such jurisdiction, such adjudication is conclusive evidence of the jurisdiction until set aside or reversed by a direct proceeding.[26]

Pleadings in a justice's court are not held to much strictness.[27]

The court to which an appeal is taken from the judgment of a justice's court can only try the issues which were tried in the justice's court.[28]

In that case there was no issue of fact in the lower court.

An order of a justice's court sustaining a demurrer to a complaint is not a judgment of that court although stated in the docket of the justice's court to be a judgment.[29]

The entry of a judgment in a justice's court upon a verdict is a mere clerical duty, and the failure to enter such judgment does not make void an execution which recites that a judgment was entered in the action.[30]

A Superior Court has jurisdiction on an appeal on questions of both law and fact from the judgment of a justice's court to allow the plaintiff to amend his complaint in the action.[31]

An abstract of a judgment of a justice's court may be filed in the office of the county clerk of the county in which the judgment was rendered, and the judgment may be docketed in the judgment docket of the Superior Court thereof, and an execution may be issued thereon by the county clerk to the sheriff of

25. Monterey v. Abbott, 77 Cal. 541.
26. Ex parte Stearns, 77 Cal. 156.
27. Liening v. Gould, 13 Cal. 598.
28. Jones v. County Court, 10 Cal. 19.
29. Sivers v. Sivers, 97 Cal. 518.
30. Lynch v. Kelly, 41 Cal. 232.
31. Kitts v. Superior Court, 62 Cal. 203; Ketchum v. Superior Court, 65 Cal. 494.

any county in the state other than the county in which the judgment was rendered.[32]

A justice's court may issue an execution to enforce a judgment of that court, but this execution must be directed to the sheriff, or to a constable of the county in which the judgment was rendered.[33]

No authority is given by statute to a justice's court to issue an execution directed to any constable or sheriff other than to a constable or the sheriff of the county in which the judgment was rendered.

It was held in Gates v. Lane, 49 Cal. 266, that a justice of the peace had jurisdiction to recall an execution issued by a county clerk on an abstract of a judgment of a justice's court rendered by such justice of the peace and filed with such county clerk.

A judgment of a justice's court creates no lien upon land of a defendant, but an abstract of such judgment filed in the office of the county recorder of the county in which the lands are situated creates a lien on the land of such defendant in that county, and such lien continues for two years unless the judgment be sooner satisfied.[34]

The office of a justice of the peace cannot be created by a city charter.[35]

The judgment of a justice's court must be on the demand sued on, and within the pleadings.[36]

Proceedings in civil actions in police courts are prescribed in the Code of Civil Procedure, sections 929-933.

I have considered thus far, remedies by the acts of parties and remedies in civil actions. Besides these remedies there are remedies given by what are designated in the Code of Civil Procedure as special proceedings; writs of review or certiorari, writs of mandate or mandamus, writs of prohibition, and writs of habeas corpus, were common law remedies, and they are given in California by the constitution of that state. The estates

32. Code of Civil Procedure, Secs. 898, 899.
33. Code of Civil Procedure, Sec. 902.
34. Code of Civil Procedure, Sec. 900.
35. Wood v. Sands, 102 Cal. 12.
36. Terry v. Superior Court, 110 Cal. 85.

of deceased persons, so far as the personal property of such estates, and the probate of wills of decedents were concerned, were administered on in ecclesiastical courts in England; courts of equity in England had to some extent jurisdiction of the estates of deceased persons and as to the guardianship of minors; and every court had jurisdiction of matters of contempt, so far as such contempt affected that court or the proceedings therein; and the right of eminent domain is inherent in every government within whose jurisdiction the property sought to be condemned for a public use, is situated; the proceedings in all these matters and in other matters, where remedies by special proceedings are given in California, are regulated by statute. In California the person commencing a special proceeding may be designated as plaintiff and the adverse party as defendant;[37] and in that state the definition of judgments, motions and orders in special proceedings are the same as they are in actions.[38]

In some of the states the person prosecuting such special proceeding may be and generally is designated as the petitioner, and the adverse party as respondent.

I will now consider but very briefly the principal remedies by special proceedings.

37. Code of Civil Procedure, Sec. 1063.
38. Code of Civil Procedure, Sec. 1064.

CHAPTER XLI.

OF WRITS OF REVIEW, OF MANDATE, AND OF PROHIBITION.

The writ of review was a common law remedy designated as a writ of certiorari, and is issued to bring up the records of the proceedings of an inferior court or tribunal, to enable the court of review to determine whether such inferior court or tribunal has proceeded within its jurisdiction.[1]

Under the provisions of the constitution of 1879 the Supreme court has jurisdiction to issue the writ to any inferior tribunal, board or officer, exercising judicial powers when such tribunal, board or officer has exceeded its or his jurisdiction, and there is no appeal, nor any plain, speedy and adequate remedy; Superior Courts have also jurisdiction to issue the writ to any inferior tribunal, board or officer exercising judicial powers.[2]

Rule 26 of the Supreme Court provides that in case a Superior Court has jurisdiction to grant a writ of review, of mandate or of prohibition, the Supreme Court will not grant such writ in the exercise of its original jurisdiction, unless the affidavit or petition therefor sets forth the circumstances showing that it is proper that the writ should issue originally from the Supreme Court.

An appeal will lie to the Supreme Court from the judgment of a Superior Court rendered in proceedings under an application for either of such writs.[3]

The writ of certiorari does not lie to review the exercise of legislative functions;[4] nor does it lie to restrain a threatened

1. People v. Commissioners, 30 N. Y. 27.
2. California Constitution, Art. VI, Secs. 2 and 5; Code of Civil Procedure, Sec. 1068.
3. Santa Cruz Gap T. Co. v. Santa Clara County, 62 Cal. 40.
4. People v. Oakland Board of Education, 54 Cal. 375; Wulzen v. Supervisors, 101 Cal. 15.

exercise of jurisdiction;[5] nor to correct erroneous decisions of an inferior court made within the limits of its jurisdiction;[6] nor in case there is an appeal from the judgment; nor in case of a judgment from which an appeal could have been taken.[7]

A writ of certiorari brings up for review but one question—and that is, whether the inferior court or tribunal had exceeded its jurisdiction. It cannot be used to correct errors of law committed by the inferior tribunal within the limits of its jurisdiction.[8]

The review under a writ of certiorari may be extended to every issue of law and fact involved in the question of jurisdiction, and not only the record, but the evidence itself when necessary for the determination of that question must be returned to the court granting the writ.[9]

When a Superior Court has jurisdiction to hear and determine a case on its merits brought to that court by an appeal from the judgment of a justice's court, an order of the Superior Court dismissing the appeal will be annulled in proceedings under a writ of certiorari.[10]

The objection that a court has reviewed its decision in an unauthorized mode, goes to the powers of the court; and its action may be annulled by certiorari.[11]

When the recitals of facts in the judgment or order sought to be reviewed under a writ of certiorari are sufficient to sustain such judgment or order, such recitals are conclusive, and no evidence can be received to impeach them.[12]

An order of a board of supervisors re-establishing a highway after it has been legally abandoned, if made without proceedings for condemnation and compensation to the owners of land through which it runs, will be annulled upon certiorari at the suit of one of such owners.[13]

5. Sayers v. Superior Court, 84 Cal. 642.
6. Sherer v. Superior Court, 96 Cal. 653; Holbrook, Merrill & Stetson v. Superior Court, 106 Cal. 589.
7. McCue v. Superior Court, 71 Cal. 545; Weil v. Light, 98 Cal. 193.
8. Sherer v. Superior Court, 96 Cal. 654; Johnston v. Supervisors, 104 Cal. 390.
9. Whitney v. Board of Delegates, 14 Cal. 500; Blair v. Hamilton, 32 Cal. 49; Schwarz v. Superior Court, 111 Cal. 112.
10. Hall v. Superior Court, 71 Cal. 550.
11. Carpenter v. Superior Court, 75 Cal. 596.
12. White v. Superior Court, 110 Cal. 60.
13. Keena v. Board of Supervisors, 89 Cal. 11.

Unless circumstances of an extraordinary character be shown to have intervened, the remedy through a writ of certiorari should be held to be barred after the lapse of one year.[14]

An order made in the excess of the jurisdiction of the court making such order may be annulled upon certiorari, although such order was made without any objection thereto on that ground.[15]

The application for the writ must be made on affidavit or verified petition by the party beneficially interested, and the court may require notice of the application to be given to the adverse party, or may grant an order to show cause why it should not be allowed, or may grant the writ without notice.[16]

The writ may be directed to the inferior tribunal, board or officer or to any other person having the custody of the record of a proceeding to be certified. When directed to a tribunal, the clerk, if there be one, must return the writ with the transcript required.[17]

The writ of review must command the party to whom it is directed to certify fully to the court issuing the writ, at a specified time and place, a transcript of the record and proceedings (describing or referring to them with convenient certainty) that the same may be reviewed by the court, and requiring the party in the meantime to desist from further proceedings in the matter to be reviewed.[18]

It is, however, in the sound discretion of the court granting the writ to have included therein, or to have omitted therefrom, an order staying proceedings in the matter to be reviewed, but if omitted, the power of the inferior court or officer is not suspended or the proceedings stayed.[19]

The writ must be served in the same manner as a summons in a civil action except when otherwise expressly directed by the court.[20]

14. Keys v. Supervisors, 42 Cal. 252; Smith v. Superior Court, 97 Cal. 352.
15. Mastick v. Superior Court, 94 Cal. 347.
16. Code of Civil Procedure, Sec. 1070.
17. Code of Civil Procedure, Sec. 1070; Onesti v. Freelon, 61 Cal. 625.
18. Code of Civil Procedure, Sec. 1071.
19. Code of Civil Procedure, Sec. 1072.
20. Code of Civil Procedure, Sec. 1073.

Under the rules of the Supreme Court a copy of the writ and of the petition therefor should be served when the writ is issued out of that court, on the attorney of the party in whose favor the order or judgment sought to be reviewed was made or rendered.

When a return is made upon an application for a writ of review, the case must be heard on the return. If the return be defective in any respect, an application should be made under section 1075 of the Code of Civil Procedure for a further return.[21]

It is not the proper function of a writ of review to add to or modify the record with reference to jurisdictional facts determined therein, but to test the question of jurisdiction on the facts appearing on the face of the record.[22]

The review upon a writ cannot be extended further than to determine whether the inferior tribunal, board or officer has regularly pursued the authority of such tribunal, board or officer.[23]

The court on hearing the return to the writ, and after hearing the parties who may attend for that purpose, may give judgment, either affirming or annulling or modifying the proceedings.[24]

The *writ of mandate,* or as it is designated at common law, the writ of mandamus, is a common law writ, and was, at common law, a high prerogative writ of a most extensive remedial character.[25]

Under the provisions of the Code of Civil Procedure this writ may be issued by any court except a justice's or police court, to any inferior tribunal, corporation, board or person to compel an act which the law specially enjoins as a duty resulting from an office, trust or station; or to compel the admission of a party to the use and enjoyment of a right of office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person; and it must be issued in

21. Hoffman v. Superior Court, 79 Cal. 475.
22. Farmers' and Merchants' Bank v. Board of Equalization, 97 Cal. 318.
23. Code of Civil Procedure, Sec. 1074.
24. Code of Civil Procedure, Sec. 1075.
25. 3 Bl. Com. 110.

all cases where there is not a plain, speedy and adequate remedy in the ordinary course of the law; it must be issued upon affidavit or verified petition on the application of the party beneficially interested.[26]

The writ may be either alternative or pre-emptory. The alternative writ must state generally the allegation against the party to whom it is directed, and command such party immediately after the receipt of the writ, or at some other specified time, to do the act required to be performed or to show cause before the court at a specified time and place why he has not done so; the pre-emptory writ must be in a similar form, except that the words requiring the party to show cause why he has not done as commanded must be omitted and a return day must be inserted.

When the application to the court is made without notice to the adverse party, and the writ be allowed, the alternative must be first issued, but if the application be made on due notice, and the writ be allowed, the pre-emptory writ may be issued in the first instance. The notice of the application when given must be at least ten days. The writ cannot be granted by default. The case must be heard by the court, whether the adverse party appear or not.[27]

The writ must be served in the same manner as a summons in a civil action except when otherwise directed by order of court.

Service upon the majority of the members of any board or body is service upon the board or body, whether at the time of the service the board, or body was in session or not.[28]

The Supreme Court will not in the exercise of its original jurisdiction grant the writ unless the affidavit or petition therefor sets forth the circumstances showing that it is proper that the writ should issue originally from the Supreme Court.[29]

When the writ is issued by the Supreme Court to an inferior tribunal, a copy of the writ and of the affidavit or petition there-

26. Code of Civil Procedure, Secs. 1085, 1086.
27. Code of Civil Procedure, Sec. 1088.
28. Code of Civil Procedure, Sec. 1096.
29. Rule 26 of the Supreme Court.

for must be served on the party litigant, if any, who may be affected by the granting of such writ.[30]

On the return of the alternative writ, or on the day for which the application for the writ is noticed, the party on whom the writ or notice has been served may show cause by answer under oath made in the same manner as an answer to a complaint in a civil action.[31]

A Superior Court may issue a writ of mandamus to run out of the county in which the court is held, or to be executed out of that county.[32]

When the answer to the affidavit for the writ raises only issues of law, the court may hear and determine the matter on the pleadings.[33]

Writs of mandate are issued only to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station.[34]

Courts having jurisdiction of the writ of mandamus may issue the same to compel the performance by the governor of a state of an act which is ministerial when the performance of such act does not necessarily pertain to the duties of the executive of the state, and the performance of which might have been directed by law to be done as well by one officer as another, when such act is directed by law to be performed by the governor, and the performance of the act is not a matter of discretion.[35]

A mandamus will not lie when there is any other specific, speedy and adequate remedy.[36]

But to supersede the remedy by mandamus a party must not only have a specific adequate legal remedy, but one competent to afford relief upon the very subject matter of his application.[37]

The remedy of a party who is entitled to have an execution issued by the clerk of the court to enforce a money judgment is

30. Supreme Court Rules.
31. Code of Civil Procedure, Sec. 1089.
32. Kings County v. Johnson, 104 Cal. 198.
33. Town of Haywards v. Pimentel, 107 Cal. 387.
34. Priest v. Reis, 93 Cal. 85; Peck v. Supervisors, 90 Cal. 384.
35. Harpending v. Haight, 39 Cal. 189.
36. People v. Olds, 3 Cal. 167; Lowry v. McLean, 62 Cal. 616; Crandall v. Amador County, 20 Cal. 72.
37. Fremont v. Crippen, 10 Cal. 211; Raisch v. Board of Education, 81 Cal. 542; Eby v. School Trustees, 87 Cal. 166.

by motion to the court for an order that the clerk issue such execution, or by an action on the official bond of the clerk, and not by mandamus.[38] But if he is entitled to have an execution issued for the possession of specific real property his remedy is by mandamus.[39]

Mandamus may be issued to a justice of the peace or to the judge of a recorder's court, compelling him to issue an execution to enforce a judgment of his court when it is his duty as such justice of the peace or as such recorder so to do.[40]

Mandamus will be issued to compel the trustees or common council of a city to act on the merits of an application of a railroad company to extend its tracks through the streets of the city without subjecting the franchise applied for, to sale to the highest bidder.[41]

Mandamus will not issue to control the judgment of an officer or tribunal having discretionary or judicial functions, but will, in a proper case, compel such officer or tribunal to act in the performance of such discretionary or judicial functions.[42]

Mandamus cannot be used to correct the error of a court in passing on questions regularly submitted to it, or to control the exercise of its discretion.[43]

If, in acting judicially, a court or officer commits an error, the remedy, if there be any, is by an appeal;[44] but if the determination of the tribunal is intended to be final, it cannot be disturbed, either on mandamus or in any other way.[45]

But if the facts be such that by reason thereof the law makes it the duty of an officer to do a specific act, then mandamus will compel that such act be done.[46]

The performance of a duty by a board of election commissioners to call and hold an election cannot be refused on the ground that there may not be sufficient funds in the treasury to

38. Fulton v. Hanna, 40 Cal. 281.
39. Carpentier v. Loucks, 28 Cal. 68.
40. Hamilton v. Tutt, 65 Cal. 57; Hayward v. Pimentel, 107 Cal. 390.
41. San Francisco and S. J. V. R. R. Co. v. Trustees of the City of Fresno, 111 Cal. 544.
42. Jacobs v. Supervisors, 100 Cal. 121; Polhemus v. Pratt, 28 Cal. 166; Lewis v. Barclay, 35 Cal. 213.
43. Strong v. Grant, 99 Cal. 100.
44. Polhemus v. Pratt, 28 Cal. 166.
45. Fairchild v. Wall, 93 Cal. 401.
46. Wood v. Strother 76 Cal. 545.

pay the expenses of such election, and the performance of such duty may be compelled by mandamus.[47]

The secretary of state may be compelled by mandamus to perform his duty in estimating votes given for members of congress as shown by the records of the counties transmitted to him by the clerks, and in issuing a certificate of election to congress to the person having the highest number of votes as shown by such records.[48]

Title to office cannot be tried on mandamus.[49]

Title to property, whether it be the right to real estate, to an office or to a franchise, cannot be tried on mandamus.[50]

When, however, title to property comes incidently in question, evidence in relation thereto will be considered to ascertain whether or not the writ should be granted.[51]

Mandamus will be granted to compel judges to hold their courts and county officers to keep their offices at the county seat of a county;[52] to enforce the duty of a water company to supply water;[53] to compel a canal corporation to construct a bridge across its ditch when legally required by an order of the board of supervisors of a county so to do;[54] to compel a judge to proceed to try a cause when it is his duty to do so;[55] to a court which refused to entertain jurisdiction of an action when it was its duty so to do;[56] to compel a court to proceed to the trial of an action for the mesne profits of land, judgment for the possession of which has been recovered by the plaintiff from the defendant in an action of ejectment and such judgment has been affirmed on an appeal;[57] to compel a court to proceed to the trial of an action although another action involving questions the decision of which might be determinative of that action, was pending on an appeal to the Supreme Court;[58] to compel a

47. Gibbs v. Bartlett, 63 Cal. 117.
48. Pacheco v. Beck, 52 Cal. 3.
49. Smith v. Olds, 3 Cal. 167.
50. Gregory v. Blanchard, 98 Cal. 311; Babcock v. Goodrich, 47 Cal. 488.
51. Eby v. School Trustees, 87 Cal. 166.
52. Calaveras County v. Brockway, 30 Cal. 325.
53. Price v. Riverside L. & I. Co., 56 Cal. 431.
54. County of Fresno v. Fowler L. Canal Co., 68 Cal. 359.
55. People v. De la Guerra, 43 Cal. 225; Tomkin v. Harris, 90 Cal. 201.
56. Beguhl v. Swan, 39 Cal. 411.
57. Avery v. Superior Court, 57 Cal. 247.
58. Dunphy v. Belden, 57 Cal. 427.

Superior Court to proceed to try an action on an appeal to that court from a justice court on questions of law and fact;[59] to compel a probate court having jurisdiction of the estate of a deceased person to act in the exercise of such jurisdiction;[60] to compel a committing magistrate to proceed with the preliminary examination of a person regularly charged with having committed a public offense who had been arrested and brought before him;[61] to compel a court to issue an attachment against defendants in an action in that court for contempt of court for violating an injunction granted by the judgment of the court, when the violation of such injunction is a violation of the rights of the plaintiff in the action;[62] to compel a judge of a court to appoint commissioners to appraise land when it is his duty so to do;[63] to compel a court to restore an attorney to practice in the court when the court has disbarred the attorney without authority;[64] to compel a court to enter judgment on the report of a referee when the law on the admitted facts as shown in the case make it the duty of the court to enter the judgment;[65] to compel a justice of the peace to enter a judgment discontinuing an action when the law on the admitted facts in the case makes this his duty;[66] to compel a sheriff to execute in his county a writ of execution to enforce a judgment of a justice's court rendered in the county, which writ has been regularly issued and placed in the hands of the sheriff to be executed in his county;[67] to compel a sheriff to restore the possession of premises to a defendant which the Supreme Court on an appeal ordered to be restored to him;[68] to compel a sheriff to execute a writ of restitution;[69] to compel a court when this is its duty under the admitted facts to fix the amount of the undertaking necessary to stay the operation of the writ of possession;[70] to compel a county treasurer to

59. Acker v. Superior Court, 68 Cal. 245.
60. Estate of Scott, 15 Cal. 220.
61. Hamilton v. Barnes, 66 Cal. 594.
62. Ortman v. Dixon, 9 Cal. 24; Merced M. Co. v. Fremont, 7 Cal. 130.
63. Lake Merced W. Co. v. Cowles, 31 Cal. 215.
64. Mulford v. Turner, 1 Cal. 143.
65. Russell v. Elliot, 2 Cal. 245.
66. Anderson v. Pennie, 32 Cal. 265.
67. North Pacific R. R. Co. v. Gardner, 79 Cal. 213.
68. Quan Wo Chung v. Laumiester, 83 Cal. 384.
69. Fremont v. Crippler, 10 Cal. 212.
70. Green v. Hibbard, 95 Cal. 39.

satisfy warrants surrendered for redemption as provided by law when there is money in the treasury properly applicable for that purpose;[71] to compel a city treasurer to pay interest on bonds when they fall due out of a fund in the city treasury for that purpose when he is required by law to do this;[72] to compel an assessor to assess for taxation property subject to such assessment;[73] to compel a county auditor to audit and allow a demand and to issue a warrant therefor when legally directed by the board of supervisors of the county to do so;[74] to compel the restoration of a teacher of the public schools to a right given by express law from which he is unlawfully precluded;[75] to compel the board of trustees of a school district to rebuild a schoolhouse destroyed by fire when the admitted facts show that this is the duty of such board;[76] to compel the board of supervisors of a county to levy a tax sufficient to pay the interest and ultimately satisfy the principal of outstanding bonds of the county when an act of the legislature requires this to be done;[77] to compel the board of supervisors of a county to subscribe for the county, to the capital stock of a railroad company, and to issue and deliver bonds of the county in payment for such stock when authorized and empowered so to do by a then constitutional act of the legislature of the state passed in 1866;[78] to compel the board of supervisors or other governing body of a city and county, city or town, to fix water rates for water furnished to the city and county, city or town, or to the inhabitants thereof;[79] to compel a board of supervisors to establish and fix rates of toll, to be collected by a toll road corporation for travel on its road constructed in that county.[80] Mandamus will not be granted in either of the following cases, namely: When the law provides

71. Day v. Callow, 39 Cal. 393.
72. Meyer v. Porter, 65 Cal. 67.
73. Hyatt v. Allen, 54 Cal. 353; McCullough v. Sham, 30 Cal. 645.
74. Babcock v. Goodrich, 47 Cal. 488.
75. Kennedy v. Board of Education, 82 Cal. 483.
76. Eby v. Board of Trustees, 87 Cal. 166.
77. Robinson v. Supervisors, 43 Cal. 353.
78. Napa Valley R. R. Co. v. Napa County, 30 Cal. 435.
79. Spring Valley W. Co. v. San Francisco, 61 Cal. 18.
80. Stoney Hill T. R. Co. v. Supervisors, 88 Cal. 632; Volcano R. Co. v. Supervisors, 88 Cal. 634.

another sufficient remedy;[81] the remedy provided by law must be, however, competent to afford relief upon the very subject matter, in respect to which the application for a mandamus was made;[82] and an equitable remedy does not deprive a party of the right to the legal remedy of mandamus;[83] to control the judgment of an officer or tribunal in the exercise of discretionary or judicial functions;[84] to compel the trustees of a city to call an election for changing the boundaries of a city when the change would be unreasonable;[85] to compel a board or tribunal to change its decision, rendered in the exercise of its discretionary judicial functions;[86] to change the determination of a tribunal when such determination was by law intended to be final;[87] to correct the errors of a court or to control its discretion.[88] Mandamus will not be granted to correct an error of a court while acting in a matter within its jurisdiction;[89] nor will it be granted in any of the following cases, namely: To compel a court to proceed with the trial of an action when the court, on an appeal from a justice's court has improperly dismissed such appeal;[90] to compel a judge of a Superior Court to issue a subpoena commanding witnesses to appear and testify in a United States land office;[91] to compel a court of record to enter a decree when it had granted to a person leave to intervene, after he had ordered such decree to be drawn up, but before the decree was entered;[92] to compel a delivery of property purchased at an execution sale, to the purchaser of the property at such sale, when such execution was against property of the judgment debtor generally;[93] to compel a justice of the peace to certify a

81. Kimball v. Union Water Co., 44 Cal. 173; Lowry v. McLaw, 62 Cal. 616; Early v. Mannix, 15 Cal. 150; Crandall v. Amador County, 20 Cal. 72; Blood v. Moore, 29 Cal. 427.
82. 10 Cal. 212.
83. 87 Cal. 166.
84. Jacobs v. Supervisors, 100 Cal. 121.
85. Wiedwald v. Trustees of San Pedro, 95 Cal. 450.
86. Magee v. Supervisors, 10 Cal. 376; Clune v. Sullivan, 56 Cal. 250.
87. Fairchild v. Wall, 93 Cal. 401.
88. Strong v. Grant, 99 Cal. 100; Donohue v. Superior Court, 93 Cal. 252.
89. Whaley v. King, 92 Cal. 431; Scott v. Superior Court, 75 Cal. 114; People v. Sexton, 37 Cal. 532; Heilbron v. Superior Court, 72 Cal. 96.
90. Wheaton v. Weston, 28 Cal. 639.
91. Boom v. De Haven, 72 Cal. 280.
92. People v. Sexton, 37 Cal. 532.
93. Gregory v. Blanchard, 98 Cal. 311.

cause pending before him to a Superior Court for trial on the ground that the question to be tried by the justice involved the possession of real property; in such case the party has his remedy by an appeal;[94] to compel an officer to perform an act beyond that enjoined by law upon him as a duty pertaining to his office or position;[95] to compel the city treasurer to pay warrants payable out of a particular fund in the city treasury when there is no money in that fund for their payment; to compel the payment of such warrants before the claims on such warrants have been audited and approved by the city council of the city when there is an ordinance of the city requiring such claims to be audited and approved by the city council before such payment;[96] to compel the treasurer of the city of Sacramento to pay interest on overdue coupons of the bonds of the city issued under the act of 1858;[97] to compel a county treasurer to pay a warrant drawn by him by the county auditor when the warrant is founded on a demand not legally chargeable against the county;[98] to compel the auditor to draw his warrant in satisfaction of a judgment in favor of the assignee of the person to whom the board of supervisors has ordered the judgment paid;[99] to compel a sheriff to deliver a certificate and deed to a purchaser at a sale for taxes under an invalid assessment;[100] to compel the custodian of a public record to allow it to be inspected by a person who has no beneficial interest in its examination;[101] to compel a person to perform an official duty after the expiration of his term of office if he does not hold the office at the time such duty is required to be performed;[102] to compel the clerk of the board of supervisors to correct the record of the board;[103] to compel the performance of an official duty before demand for such performance, and a neglect or refusal to perform such duties.[104]

94. Clark v. Minnis, 50 Cal. 509.
95. Davis v. Porter, 66 Cal. 658; City of Napa v. Rainey, 59 Cal. 275; Patty v. Colgan, 97 Cal. 251.
96. Du Bordieu v. Butler, 49 Cal. 512.
97. Bates v. Gerber, 82 Cal. 550.
98. Keller v. Hyde, 20 Cal. 593; Connor v. Morris, 23 Cal. 447.
99. Scheerer v. Edgar, 76 Cal. 569.
100. Bosworth v. Webster, 64 Cal. 1.
101. Colnon v. Orr, 71 Cal. 43.
102. Leach v. Aitken, 91 Cal. 484.
103. Wigginton v. Markley, 52 Cal. 411.
104. Talcott v. Harbor Comrs., 53 Cal. 199.

The writ of prohibition is a common law writ.[105] It may be issued by any court, except a police or justice's court, to an inferior tribunal or to a corporation, board or person, in all cases in which there is not a plain, speedy, and adequate remedy in the ordinary course of law, and it arrests the proceedings of such tribunal, corporation, board or person exercising functions judicial when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person; it can only be issued upon affidavit, or verified petition on the application of the person beneficially interested; it must be either alternative or pre-emptory.[106]

The pre-emptory writ will not be issued in the first instance except on notice of at least ten days to the parties who will be affected by the issuance of the writ.[107]

The writ of prohibition mentioned in the constitution is the writ of prohibition known to the common law, and its office is to restrain subordinate courts and inferior judicial tribunals from exceeding their jurisdiction.[108]

The legislature cannot extend or enlarge the office of the writ of prohibition so as to include ministerial functions.[109]

The operation of the writ is preventive and remedial; but if the action of an inferior tribunal is not fully completed, further proceedings of that tribunal may be stayed, and its previous proceedings may be annulled, if that be necessary in order that the remedy under the writ may be complete.[110]

The writ of prohibition does not run against a ministerial officer; but when a receiver is acting under a void order of a court, the writ will run against such receiver to prevent further action by him under such void order, and to compel the restoration of property seized and held by the receiver under such void order.[111]

The writ of prohibition will not be issued by the Supreme Court unless the attention of the court, whose proceedings are

105. 3 Bl. Com. 112.
106. Code of Civil Procedure, Secs. 1102, 1103, 1104.
107. Code of Civil Procedure, Secs. 1088, 1105.
108. Maurer v. Mitchell, 53 Cal. 289.
109. Farmers' C. C. M. v. Thresher, 62 Cal. 407; Hobart v. Tillson, 66 Cal. 210; Coronado v. San Diego, 97 Cal. 440.
110. Havemeyer v. Superior Court, 84 Cal. 327.
111. Havemeyer v. Superior Court, 84 Cal. 327.

sought to be stayed, has been called to the alleged excess of jurisdiction.[112]

If, however, want of jurisdiction is apparent on the face of the proceedings, or if objection was made to the jurisdiction of the lower court so far as there was opportunity so to do, the Supreme Court will, on application therefor duly made, issue the writ without the excess of its jurisdiction having been further brought to the attention of the lower court.[113]

The writ will not issue in either or any of the following cases, namely: To prohibit the exercise of ministerial functions except those of a receiver as hereinbefore stated;[114] to prohibit the exercise of judicial functions when there is a speedy and adequate remedy by appeal;[115] to set aside acts already fully performed;[116] to stay proceedings when such proceedings have been withdrawn or dismissed;[117] to prevent the usurpation of an office;[118] to stay an investigation by the governor into the conduct of the state board of prison directors;[119] to stay proceedings under an order for the election of fifteen freeholders to prepare and propose a city charter;[120] to prohibit the supervisors of San Francisco from fixing water rates;[121] to stay proceedings under an order of sale which is void on its face;[122] to arrest proceedings of a judicial tribunal when there is a plain, speedy and adequate remedy in the ordinary course of law either by appeal or otherwise;[123] to restrain the exercise of its powers by

112. Southern P. R. R. Co. v. Superior Court, 59 Cal. 471; Baughman v. Superior Court, 72 Cal. 572.
113. Havemeyer v. Superior Court, 84 Cal. 327.
114. Coronado v. San Diego, 97 Cal. 440; Hobart v. Tillson, 66 Cal. 210; Havemeyer v. Superior Court, 84 Cal. 327.
115. Powelson v. Lockwood, 82 Cal. 613; Agassiz v. Superior Court, 90 Cal. 101.
116. Hall v. Superior Court, 63 Cal. 179, except as stated in Havemeyer v. Superior Court, 84 Cal. 327.
117. Pezuela v. Superior Court, 83 Cal. 49.
118. Bucher v. Veuve, 63 Cal. 304.
119. Chapman v. Stoneman, 63 Cal. 490.
120. Taylor v. Board of Election Comrs., 54 Cal. 404.
121. Spring Valley Water Works v. Bartlett et als., 63 Cal. 245.
122. Woodward v. Superior Court, 95 Cal. 272.
123. Mines D'O v. Superior Court, 91 Cal. 101; Murphy v. Superior Court, 84 Cal. 592; Fresno National Bank v. Superior Court, 83 Cal. 491; Levy v. Wilson, 69 Cal. 105; Agassiz v. Superior Court, 90 Cal. 101; Bishop v. Superior Court, 87 Cal. 226; Clark v. Superior Court, 55 Cal. 199; Powelson v. Lockwood, 82 Cal. 613; Strauss v. Police Court, 85 Cal. 49.

an inferior court in a case in which the question of its jurisdiction to exercise such powers remains undetermined by that court;[124] to arrest the proceedings of a board of supervisors when such proceedings are not absolutely without or in excess of the jurisdiction of the board;[125] to arrest legislation pending in a board of supervisors when such legislation is authorized by law;[126] to arrest judicial proceedings which are not without nor in excess of the jurisdiction of the court in which such proceedings are pending;[127] to restrain the prosecution of an action by city authorities to condemn a right of way for a sewer if the application for the writ is on the ground that there was no averment or proof in such proceedings that the city authorities were unable to agree with the defendant in such proceedings for the right of way, or if on the ground that the local board of the municipal corporation had not expressly directed the institution of the proceedings;[128] to restrain the trial of an action in the the Superior Court when there was an appeal pending from the order of that court refusing to change the place of trial of the action;[129] to restrain a Superior Court from proceeding with the trial of matters, when such trial was not stayed, on an appeal to the Supreme Court;[130] to prevent a Superior Court from trying a cause after a petition and bond had been filed for the removal of such cause to the Circuit Court of the United States;[131] to prevent a Superior Court from trying an action on an appeal from a justices' court on the ground that the undertaking on the appeal has been filed before service of the notice of appeal;[132] to restrain a Superior Court from trying an action on an appeal from a justice court taken on question of law alone, and the Superior Court had reversed the judgment in the justice's court, and ordered a new trial in the Superior Court on issues of fact, joined in the justice's court;[133] to

124. Chester v. Colby, 52 Cal. 516.
125. Brundage v. Supervisors, 47 Cal. 81.
126. Spring Valley Water Works v. San Francisco, 52 Cal. 111.
127. More v. Superior Court, 64 Cal. 345.
128. Bishop v. Superior Court, 87 Cal. 226.
129. Scannell v. Whitney, 47 Cal. 584.
130. Bliss v. Superior Court, 62 Cal. 543.
131. Southern P. R. R. Co. v. Superior Court, 63 Cal. 607; Central P. R. R. Co. v. Superior Court, 62 Cal. 618.
132. Dutertre v. Superior Court, 84 Cal. 535.
133. Curtis v. Superior Court, 63 Cal. 435.

prevent a Superior Court from passing on a motion to dismiss an information, from looking into and considering the depositions and evidence transmitted to it and on file among the papers of the case;[134] to restrain the trial of a criminal case for mere irregularities and errors in law before and after the finding and return of the indictment, or on information, when the court has jurisdiction of the subject matter and the person;[135] to prevent a justice's court from trying a charge against a person of having carried on business without a license.[136]

The Supreme Court will not issue the writ to prohibit a Superior Court from proceeding in the trial of an action in that court, after that court had denied a motion to enter an interlocutory judgment in the action on findings which had been filed.

If there was error in the rulings of the court, the remedy was by appeal.[137]

The general rule in respect to the granting of writs of prohibition is that the writ will be granted to restrain an inferior tribunal from exceeding its jurisdiction, when there is not a plain, speedy and adequate remedy in the ordinary course of law.

If there be such remedy the writ will not be granted; and it will not be granted to restrain acts which are purely ministerial.

The writ will be granted in the following cases, namely: to restrain a judge who is disqualified from acting in a case from acting as judge in the case;[138] to restrain a court from proceeding in the trial of a cause when expressly prohibited by the insolvent act of 1880 from so doing;[139] to restrain a Superior Court from proceeding in the matter of the removal of the officers of a corporation in a case in which such Superior Court has no jurisdiction to order such removal; the corporation itself was the proper petitioner for the writ in that case.[140]

134. Weden v. Superior Court, 55 Cal. 504.
135. Levy v. Wilson, 69 Cal. 105; Powelson v. Lockwood, 82 Cal. 613.
136. Strouse v. Police Court, 85 Cal. 49.
137. Broder v. Superior Court, 103 Cal. 124.
138. North Bloomfield G. C. Co. v. Keyser, 58 Cal. 315.
139. Hayne v. Justice's Court, 82 Cal. 284.
140. Cholla M. Co. v. Wilson, 66 Cal. 374.

The office of a writ of review is to annul a judgment, decision or order of an inferior tribunal or officer exercising judicial functions when rendered or made in excess of the jurisdiction of such tribunal or officer or so much thereof as is in excess of such jurisdiction.

The office of the writ of prohibition is to prevent an inferior tribunal or officer, exercising judicial functions, from acting in excess of its or his jurisdiction.

The office of the writ of mandate is to compel an inferior tribunal, corporation, board or person to perform an act which the law specially enjoins as a duty resulting from an office, trust or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person.

The writ of review will not be granted except on the application on affidavit or a verified petition of the party beneficially interested, showing facts which are good grounds for granting the writ: nor will the writ be granted if the party beneficially interested has an appeal from the judgment or order complained of, or, in the judgment of the court issuing the writ, any other plain, speedy or adequate remedy.

Neither the writ of mandate or the writ of prohibition will be granted, except on an application, made on the affidavit or verified petition of the party beneficially interested, showing facts which are good grounds for granting the writ, nor in a case in which such party has a plain, speedy and adequate remedy in the ordinary course of law. A remedy by appeal has been held generally to be such plain, speedy and adequate remedy.

If the application be for a writ of review, the court may require notice of the application to be given to the adverse party of the hearing of the application, or may grant an order that such adverse party show cause why the writ should not be granted; if the writ of review be granted and issued, the party to whom it is directed, or if directed to a tribunal having a clerk, the clerk of such tribunal must certify fully to the court issuing the writ, as his return to the writ, a transcript of the record and

proceedings required to be certified by the commands of the writ, and the court issuing the writ on such return, or on such further return as may be ordered, decides whether the judgment, decision or order claimed to be in excess of the jurisdiction, should be affirmed, annulled or modified and to what extent, and will enter its judgment accordingly.

If an alternative writ of mandate or prohibition be granted in the first instance, the adverse party on whom it is served must answer under oath the allegations in the affidavit or petition for the writ in the same manner as an answer to a complaint in a civil action.

If the adverse party be of the opinion that the facts stated in the affidavit or petition for the writ, did not, as a matter of law, entitle the applicant to have the writ granted, he can demur to the affidavit or petition specifically stating the grounds of such demurrer. Since, however, the purpose of such writs is to grant speedy relief such adverse party, if he deems the allegations in such affidavit or petition, or some of them, should be answered, should answer the same under oath at the time he files such demurrer.[141]

If notice be served on such adverse party of the application for such writs and of the hearing of such application, such adverse party may at the time designated for such hearing, show cause, by demurrer to the affidavit or petition for the writ, or by answer thereto, or by both, why the writ asked for should not be granted.

When the answer to the affidavit or petition on the application for the writ raises material issues of fact, the court may in its discretion order such issues of fact to be tried by a jury.[142]

If the application for any of such writs be made to the Supreme Court in the first instance, in a case in which such application could have been lawfully made to some other court, the affidavit or petition for the writ must in addition to the necessary matters requisite by the rules of law to support the application for the writ, also set forth the circumstances, which,

141. Rule 26 sub. 3 of the Supreme Court Rules.
142. Code of Civil Procedure, Sec. 1090.

in the opinion of the applicant, render it proper that the writ should issue originally from the Supreme Court, and in case any court, judge or other officer, or any board or other tribunal in discharge of the duties of a public character, be named in the application as respondent, the affidavit or petition shall also disclose the name or names of the real party or parties, if any, whose interest would be directly affected by the proceedings, and in such case it shall be the duty of the applicant obtaining an order for such writ to serve or cause to be served upon such party or parties in interest a true copy of the affidavit or petition, and of the writ issued thereon, in like manner as the same is required to be served upon the respondent named in the application in the proceedings, and to produce and file in the office of the clerk of that court like evidence of such service.[143]

By subdivision 2 of the same rule, all ex parte applications to that court for the issuance of such writs in the exercise of its original jurisdiction, shall be in writing, and filed with the clerk, and the same shall be accompanied by a memorandum of the points and authorities upon which the applications are made.

And by subdivision 4 of the same rule, it is provided that when an application is made to the Supreme Court for an alternative writ, an order staying the proceedings of a court or officer, until the return of the writ, will not be made, unless due notice of the application for the writ, shall have been given to all the parties in the proceedings.

It is provided by rule XX of that court that in all cases where notice of a motion is necessary, unless for good cause shown the time is shortened by the court, the notice shall be ten days.

The provisions of the Code of Civil Procedure as to civil actions constitute the rules of practice in special proceedings on and under the application for these writs, except as otherwise provided; and the provisions of that code as to new trials and appeals, so far as they are not inconsistent with such special

143. Rule 26 of the Supreme Court.

provisions, are applicable to the proceedings on applications for such writs.[144]

Sections 1097 of the Code of Civil Procedure provides for the enforcement of judgments rendered in proceedings on applications for these writs.

144. Code of Civil Procedure, Secs. 1109, 1110.

CHAPTER XLII.

OF ELECTIONS AND CONTESTING ELECTIONS.

The provisions of the Code of Civil Procedure (sections 1111-1127) respecting the contesting of elections in certain cases are full and explicit, and I will in this work, refer only to decisions of the Supreme Court of California construing such provisions, and to the provisions of the statutory law of that state relating to elections.

The provisions of section 4 of article II of the state constitution do not preclude either soldiers, students or the inhabitants of a soldier's home, or of any infirmary, from gaining a residence for the purpose of voting.[1]

The provisions of section 1104 of the Political Code contemplates only the publication of one general list in a county of all nominations, upon which the people of the county will be called to exercise their choice.[2]

If the requisite number of inspectors, judges, and clerks of election be not appointed, the presumption is, in the absence of a showing to the contrary, that the deficiency was supplied by the the electors present at the time of opening the polls.[3]

Directory statutory provisions in respect to elections should be substantially complied with.[4]

Ballots are the best evidence of the manner in which the electors have voted, only when it is shown satisfactorily that they have been preserved substantially as provided by statute.[5]

The official canvass of votes is presumed to be correct, and in order to overcome that presumption by a resort to the ballots,

1. Stewart v. Keyser, 105 Cal. 459.
2. Johnson v. Yuba County, 103 Cal. 538.
3. Brown v. Union H. District, 101 Cal. 655.
4. Tibbe v. Smith, 108 Cal. 101.
5. Same case.

it must be shown to the court that such ballots are intact and genuine, and proof must be made of a substantial compliance with the requirements of the statute as to the keeping and preservation of such ballots.[6]

The X stamp to indicate the person for whom the voter intended to cast his ballot should be placed to the right of the name of such person, but such stamp is not required to be in the blank left in the ballot for the placing of such stamp.

Any mark on a ballot, other than such stamp, and which might be used to distinguish the ballots, renders the ballot on which such mark was placed, void.[7]

When the failure of an election board of a precinct to comply with the directory statutory provisions, is of such a character that it can be readily shown by competent proof, and it is so shown, that no fraud was committed, nor injury done, by such failure, this does not make invalid the votes cast in such precinct.[8]

The provisions of the election law requiring the voter to mark his ballot by means of a stamp by putting a cross opposite the name of each candidate for whom he intends to vote is mandatory.[9]

A ballot marked with a lead pencil and not with an official stamp is invalid.[10]

The right to contest an election is purely statutory.[11]

The notice of an election in a school district must clearly state the particular place at which such election is to be held; and if this is not done, the election will be invalid.[12]

An election for the issuance of bonds of an irrigation district is void if the statutory notice of the times of the opening and closing the polls be not given, and the polls are not opened or closed substantially at the times as prescribed by statute.[13]

The fact that the candidate receiving the highest number

6. Tibbe v. Smith, 108 Cal. 101.
7. Tibbe v. Smith, 108 Cal. 101.
8. Atkinson v. Lorbeer, 111 Cal. 419.
9. Lay v. Parsons, 104 Cal. 661.
10. Beasley v. Sausalito, 106 Cal. 500.
11. Carlson v. Burt, 111 Cal. 129.
12. People v. Caruthers School District, 102 Cal. 184.
13. Fallbrook Irrigation District v. Abila, 106 Cal. 365.

of votes for an office is ineligible, does not give the office to the next highest on the list.[14]

The statutes of California relating to the contesting of elections relate to a contest when a *person has been declared elected,* and if no one was declared elected, then no contest can arise under the provisions of such statute.[15]

Under the provisions of 1123 of the Code of Civil Procedure, the court in which the contest was had, when it appears that another person has received the highest number of votes, must declare such other person elected.

The Superior Court of a county has jurisdiction of a contest to determine the right of a person to an office to be exercised in such county.[16]

The statement of the grounds of a contest should be a statement of facts and not one of a mere conclusion of law.[17]

Judgment cannot be rendered in a contested election case for a failure to answer the statement of the contestant.[18]

The contestant must show that illegal votes were cast, and were cast for the contestee, and that such illegal votes so cast for the contestee, if deducted from the votes canvassed as having been cast for him, would show that the contestee had not the highest number of legal votes for the office, to which he had been declared elected at such election, before the court can annul the election of the person declared by the board of canvassers to have been elected.[19]

Election returns should not be rejected on account of an irregularity in the appointment of the officers of election, when it does not appear that any injurious results were caused thereby.[20]

The court which tries an election contest cannot grant a new trial,[21] but the aggrieved party is entitled to an appeal to the Supreme Court.[22]

14. Saunders v. Haynes, 13 Cal. 146.
15. Austin v. Dick, 100 Cal. 199.
16. McGivney v. Pierce, 87 Cal. 124.
17. People v. County of Glenn, 100 Cal. 419.
18. Searcy v. Grow, 15 Cal. 118.
19. Russell v. McDowell, 83 Cal. 70.
20. Keller v. Chapman, 34 Cal. 637.
21. Cosgrove v. Howland, 24 Cal. 457.
22. Webster v. Byrnes, 34 Cal. 273.

The Supreme Court can grant a new trial.[23]

There must be a special session of the Superior Court for the trial of an election contest,[24] and an unauthorized continuance of a trial of the contest operates as a discontinuance of the proceedings.[25]

23. 83 Cal. 70.
24. Code of Civil Procedure, Sec. 1118.
25. Keller v. Chapman, 34 Cal. 685.

CHAPTER XLIII.

OF THE CONFESSION OF A JUDGMENT; AND OF THE DISCHARGE OF A PERSON IMPRISONED ON CIVIL PROCESS; AND OF THE SUBMISSION OF A CAUSE OF ACTION UPON AN AGREED CASE.

The Code of Civil Procedure, sections 1132-1135, provides for the confession of judgment without action, and sections 1138, 1140 provide for submitting a difference which might be the subject of a civil action, upon an agreed case, and sections 1143, 1153 provide for the discharge of a person imprisoned on civil process.

The authority given by statute, for the entry of a judgment by confession, must be strictly pursued and the confession must not be fraudulently made.[1]

Unless a judgment by confession be void on its face, it can only be called in question by the creditors of the defendant who confessed judgment in a direct proceeding for that purpose.[2]

The allegations of the complaint attacking a judgment by confession as fraudulent, must state facts showing that such judgment was fraudulent.[3]

A person who is imprisoned on an execution issued on a judgment in a civil action must be discharged therefrom upon the conditions specified in section 1144 of the Code of Civil Procedure, and in the provisions of that code thereafter following.

A written notice of the hearing of the application must be given to the plaintiff or to his attorney, at least one day before the hearing.[4]

1. Chapin v. Thompson, 20 Cal. 681; Pond v. Davenport, 44 Cal. 481; Wilcoxson v. Burton, 27 Cal. 228; Cordier v. Schloss, 18 Cal. 576; Reynolds v. Lincoln, 71 Cal. 183; Scales v. Scott, 13 Cal. 77; Crane v. Hirshfelder, 17 Cal. 582.
2. Meeker v. Harris, 19 Cal. 278.
3. Pehrson v. Hewitt, 79 Cal. 594.
4. Code of Civil Procedure, Secs. 1144, 1145.

If the application be refused, it may be renewed at the expiration of each succeeding ten days.[5]

If the application be granted, the applicant must take the oath prescribed by section 1148 of the Code of Civil Procedure.

If the creditor of the person so imprisoned, or his agent or attorney, do not advance to the jailor sufficient money for the support of the person so imprisoned, as provided in section 1154 of the Code of Civil Procedure, the jailor must forthwith discharge such person from such imprisonment.

When a controversy is submitted without action, an affidavit must be filed showing that the controversy is real, and that the proceedings are in good faith to determine the rights of the parties. The agreed case must contain the facts upon which the controversy depends.[6]

5. Code of Civil Procedure, Sec. 1550.
6. Code of Civil Procedure, Sec. 1138.

CHAPTER XLIV.

OF FORCIBLE ENTRY, AND FORCIBLE AND UNLAWFUL DETAINER.

The violently taking or keeping possession of land and tenements with menaces, force and arms, and without the authority of law, was a public offense at common law.

A peaceable entry on and the taking possession of land by a person entitled to such possession was permissible at common law, but such peaceable entry, if made, could not be maintained with force, with violence, and with unusual weapons until after the occupancy of the land under such entry has ripened into a peaceful possession by a peaceable enjoyment of the land for three years.[1]

When there has been a forcible entry on lands in the possession of another person, and when there had been a peaceable entry on lands in the possession of another person and the occupancy of the land under such entry is maintained with force, menaces and violence, the laws have provided a summary remedy for the restoration of the person deposed, to the possession of the land.

The law has also provided a summary remedy for the restoration to a landlord from a tenant of the possession of lands leased to such tenant in case he unlawfully detains from his landlord the possession of the land so leased.

In an action or proceeding for such restoration title to the land cannot be inquired into.

In such action by a landlord against a tenant such tenant is estopped from denying the title of the landlord.

The statutes of California (Code of Civil Procedure, sec-

1. 4 Bl. Com. 148, 149.

tions 1159-1179) have provided for such summary remedies in that state.

These remedies provide for the assessment of damages caused by such forcible entry and detainer, and by a forcible or unlawful detainer, and if the unlawful detainer be by a tenant owing rent, they provide for a finding of the amount of rent due; and they provide in these cases for judgment for the plaintiff for the recovery of three times the amount of damages so assessed, or of the rent so found due.[2]

In case the landlord dies, the executor of his will, or the administrator of his estate, is the successor in the estate of the landlord for the purpose of giving the notice authorized by section 1161 of the Code of Civil Procedure, and for the enforcing against the tenant, who is guilty of an unlawful detainer, the remedies authorized by that code.[3]

The person alleged to be a tenant may allege and show in such action that he was induced to accept the lease by any fraud of the lessor, which, if shown, would destroy the relation of landlord and tenant and remove the estopel.[4]

In an action for a forcible entry and for a forcible detainer, a finding showing a forcible detainer will support a judgment in favor of the plaintiff in the action.[5]

One cotenant can maintain an action of unlawful detainer without joining the other cotenants.[6]

The action of unlawful detainer cannot, in case of the death of the tenant, be maintained against the executor of his will, who succeeds to the possession of leased premises held by the deceased at the time of his death but makes default in the payment of rent.[7]

The action may be maintained against a tenant at will, after notice of thirty days, to terminate the tenancy, and a subsequent notice to quit.[8]

In order to maintain an action of forcible entry, the plain-

2. Code of Civil Procedure, Sec. 1174.
3. Knowles v. Murphy, 107 Cal. 107.
4. Knowles v. Murphy, 107 Cal. 107.
5. Adams v. Helbing, 107 Cal. 298.
6. Lee Chuck v. Quan Wo Chong Co., 91 Cal. 593.
7. Cartel v. Meehan, executor, 63 Cal. 47.
8. Hall v. Wallace, 88 Cal. 434.

tiff must allege and show that he was in the actual and peaceful possession of the property entered upon, and that the defendant by some kind of violence or circumstances of terror entered into or upon the property, and so turned the plaintiff out and took and held possession himself, or that after making a peaceable entry, the defendant by force, threats or menacing conduct turned the plaintiff out and took the possession.[9]

The possession of the plaintiff must be actual and of sufficiently long standing to become, to a legal intent, peaceable, before an action for a forcible entry can be maintained by him.[10]

A peaceable entry made on lands in bad faith is unlawful; and in a case in which it is material to determine whether such entry by a defendant was in good or bad faith, the defendant might, under the forcible entry and detainer act of 1865-6, produce evidence of title, for the sole purpose, however, of showing that his entry was in good faith, or produce evidence of his right as a pre-emptor to enter on such land.[11]

But it has been subsequently held by the Supreme Court that evidence of good faith, or of title, is not admissible in summary proceedings to obtain possession of real property, under the provisions of the Code of Civil Procedure, for the purpose of showing whether a peaceable entry was or was not unlawful, or made in good faith, and this is the rule in New York.[12]

The general terms, "actions of forcible entry and detainer," as employed in the constitution of California, include actions for the unlawful holding over by tenants.[13]

If the owner of land lets the same for a share of the crops, as rent, the relation of landlord and tenant as to the land exists between the owner of the land and the person to whom it is so let.[14]

The words "expiration of the term," employed in subdivis-

9. Castro v. Tewksbury, 69 Cal. 562.
10. Hoag v. Pierce, 28 Cal. 187.
11. Shelby v. Houston, 38 Cal. 410; Townsend v. Little, 45 Cal. 673.
12. Bank of California v. Taafe, 76 Cal. 628; Voll v. Hollis, 60 Cal. 474, 475.
13. Brummagim v. Spencer, 29 Cal. 661.
14. Jones v. Durrer, 96 Cal. 95.

ion 1 of section 1161 of the Code of Civil Procedure refers only to the expiration of the term specified in the lease by lapse of time, and does not refer to the expiration of such term by a forfeiture for non-payment of rent.[15]

In case of non-payment of rent due for three days after notice in writing requiring its payment (stating the amount which is due) or the possession of the property, the landlord can maintain the action.[16]

If the tenant assigns or sublets the leased premises, or commits waste thereon, contrary to the covenants of the lease, the lease is thereby terminated, and the landlord or his successor in estate, may, upon service of three days' notice to quit upon the person or persons in possession, maintain against such persons an action for an unlawful detainer.[17]

The action can be maintained by the landlord after a neglect or failure to perform convenants in the lease, other than for the payment of rent, and a failure to perform them for three days after notice in writing requiring performance of such covenants, or the delivery of the possession of the leased property.[18]

But if such conditions and covenants cannot be performed subsequent to the time at which they should have been performed, the action for unlawful detainer may be maintained without giving such notice.[19]

Whenever the right of entry is given to a grantor or lessor in a grant or lease, such entry may be made at any time after the right has accrued upon the three days' notice, as provided in sections 1161 and 1162 Code of Civil Procedure, and in the Civil Code, section 791; and a landlord cannot maintain an action for unlawful detainer until after such three days' notice has been given.[20]

An action for an unlawful detainer cannot be maintained in California against a tenant at will, until at least one month's

15. Silva v. Campbell, 84 Cal. 420.
16. Code of Civil Procedure, Sec. 1161.
17. Sub. 4 of Sec. 1161, Code of Civil Procedure; Bernero v. Allen, 68 Cal. 505.
18. Sub. 3 of Sec. 1161, Code of Civil Procedure; Opera House v. Burt, 52 Cal. 471.
19. Kelly v. Teague, 63 Cal. 68.
20. Smith v. Hill, 63 Cal. 51.

notice to quit, and after the termination of the lease by this notice, a further notice demanding possession of the property, and a failure of the tenant for three days thereafter to surrender such possession.[21]

A person may be an occupant and have a peaceable and undisturbed possession of land without the actual presence of himself or of any person in his behalf.[22]

Under the provisions of the section 1172 of the Code of Civil Procedure the plaintiff may in an action for a forcible detainer introduce evidence to show that he was entitled to the possession of the land at the time of the forcible detainer.[23]

But title cannot be tried in an action for an unlawful detainer.[24]

A judgment roll in an action of unlawful detainer is not evidence of title.[25]

Under the forcible entry and unlawful detainer act of 1866, neither the court nor jury could assess damages for waste or injury to the real estate for the possession of which the action was brought.[26]

The provisions of the Code of Civil Procedure as to such damages are similar to those in said act of 1866.

Right of possession cannot be litigated in an action of forcible entry and unlawful detainer.[27]

A deed from a person who was in actual peaceable possession of the land sued for to the plaintiff is admissible to show a transfer of possession of the land to plaintiff, but not as any evidence of title.[28]

Sections 1161 and 1179 of the Code of Civil Procedure contain provisions under which the court may relieve a tenant against a forfeiture of his lease.

21. King v. Connolly, 51 Cal. 181; Martin v. Splivalo, 56 Cal. 128.
22. Wilson v. Shackelford, 41 Cal. 630; Giddings v. Land and Water Company, 83 Cal. 96; Gray v. Collins, 42 Cal. 152; Goodrich v. Van Landigham, 46 Cal. 601; Baker v. Dickson, 62 Cal. 19.
23. Murphy v. Snyder, 67 Cal. 451.
24. Mecham v. McKay, 37 Cal. 154; Commissioners v. Barnard, 98 Cal. 199; Giddings v. Land and Water Co., 83 Cal. 96.
25. Fish v. Benson, 71 Cal. 428.
26. Warburton v. Doble, 38 Cal. 619.
27. Sanchez v. Loureyro, 46 Cal. 641.
28. Conroy v. Duane, 45 Cal. 597.

These provisions must be strictly followed before such relief can be had.

On a trial of any proceedings for a forcible entry, or a forcible detainer, the defendant may, under the provisions of section 1172 of the Code of Civil Procedure, introduce evidence to show that he or his ancestors, or those whose interest in the premises he claims, have been in the quiet possession thereof for the space of one whole year together, next before the commencement of such proceedings, and that his interest therein is not then ended or terminated.[29]

29. Code of Civil Procedure, Sec. 1172.

CHAPTER XLV.

OF THE ENFORCEMENT OF LIENS OF MECHANICS AND OTHERS UPON REAL PROPERTY; AND OF LIENS FOR WAGES AND SALARIES.

The Code of Civil Procedure, sections 1183-1203, provides for the enforcement of liens of mechanics and others against real estate, and sections 1204-1207 of that code provide for the enforcement of liens for salaries and wages.

It is declared in the constitution of California, Art. XX, section 15, that mechanics, material men, artisans and laborers of every class shall have a lien upon the property upon which they have bestowed labor or furnished materials, for the value of such labor done and materials furnished, and that the legislature shall provide by law for the speedy and efficient enforcement of such liens.

It is also declared in the same constitution that no person shall be deprived of his life, liberty, or property without due process of law.

These provisions of the constitution are to be construed together and the legislature has not the constitutional power to provide for the speed and efficient enforcement of such liens, in such a way as would deprive a person of his property, without due process of law.

The provisions of said section 15 of Art. XX of the constitution is not self executing, and are inoperative except as supplemented by legislation.[1]

No public property, such as a public school house or other public building, nor the property of a public municipal corporation is subject to a mechanic's lien.[2]

1. Spinney v. Griffith, 98 Cal. 149.
2. Mayrhofer v. Board of Education, 89 Cal. 110; Bates v. County of Santa Barbara, 90 Cal. 543; Griffith v. Happersberger, 86 Cal. 606.

When the owner of real estate has knowledge of the construction of buildings, and other improvements thereon, and fails to give notice as provided in section 1192 of the Code of Civil Procedure that he will not be responsible for the same, the interest of such owner in the real estate is subject to the lien, if any, for the construction of such buildings or other improvements.[3]

When the owner of real estate has contracted for the erection of improvements on such real estate, and the agreed contract price therefor exceeds one thousand dollars, he must make such contract in writing, and this must be subscribed by the parties thereto, and this contract, or a memorandum thereof, containing the particulars prescribed by section 1183 of the Code of Civil Procedure, must be filed in the office of the county recorder of the county in which the property is situated, before the work is commenced, otherwise such contract is void, and in such case, the labor done and materials furnished for the improvement, except by the original contractor, shall be deemed to have been done and furnished at the personal instance of the owner. No part of the contract price shall, by the terms of any such contract, be made payable or be paid in advance of the commencement of the work, but the contract price for the work must, by the terms of the contract, be payable in installments after the commencement of the work, and at least twenty-five per cent. of the whole contract price, shall be made payable at least thirty-five days after the completion of the contract.[4]

If the contract for the work refers to plans and specifications for the work, and makes the same a part of the contract, such plans and specifications should be filed with the contract, or a very full memorandum thereof should be filed with the contract, in the office of the county recorder, as required by the provisions of section 1183 of the Code of Civil Procedure.[5]

When the claim of a laborer for work is deemed to have been performed at the personal instance of the owner of the real

3. Harlan v. Stufflebeem, 87 Cal. 508.
4. Code of Civil Procedure, Secs. 1183, 1184.
5. Dunlop v. Kennedy, 102 Cal. 443; Willamette Co. v. Los Angeles C. Co., 94 Cal. 229; Greig v. Riordan, 99 Cal. 316; Wood v. Transit Co., 107 Cal. 500.

estate, such claim must be filed within thirty days after the completion of the building on which such work was done.[6]

Any person entitled to a lien under the provisions of section 1183 of the Code of Civil Procedure, except the contractor, may at any time give to the reputed owner of the real estate on which the improvement is made, a written notice that he has performed labor, or furnished material, or both, on or for an improvement on such real estate to the contractor, or other persons acting for the reputed owner, making such improvement, or that he has agreed to do so, stating in general terms the kind of labor and materials, and the name of the person to or for whom the same was done or furnished, or both, and the amount in value thereof. Upon receiving such notice, such reputed owner must withhold from such contractor, or any other person acting under such reputed owner, to whom the said labor or materials, or both, have been furnished or agreed to be furnished, sufficient money due, or to become due, to answer the claim specified in the notice, and any lien that may be legally filed therefor, including counsel fees not exceeding one hundred dollars in each case, and costs.[7]

The legislature of 1897 for the purpose of avoiding the uncertainty previously existing as to the time of the completion of an improvement or structure, or the cessation from labor upon an unfinished contract therefor, amended section 1187 of the Code of Civil Procedure, and in that amendment required the owner of any property on which labor had been performed, or for which materials have been furnished to be used in the construction, alteration, addition to, or repair, either in whole or in part of any work mentioned in section 1183 of the Code of Civil Procedure, within ten days after the completion thereof, or within forty days after the cessation of labor thereon under an unfinished contract for the construction thereof, to file for record and have recorded in the office of the county recorder of the county in which the real estate or some part thereof is situated, a verified notice, showing among other things, the time of the completion of the improvement, or the time of the cessation of labor thereon under such contract, and any original contractor

6. Davis v. MacDonough, 109 Cal. 547.
7. Code of Civil Procedure, Sec. 1184.

for the work can at any time after the completion of his contract, and until the expiration of sixty days after the filing of such notice, and any other person entitled to a lien under the provisions of section 1183 of the Code of Civil Procedure, can at any time after the completion of the improvements and until the expiration of thirty days after the filing of such notice, or the performance of any labor in a mining claim, file his claim of lien as provided in section 1187 of the Code of Civil Procedure. It is provided, however, in that amendment that in any event such claim of lien must be filed within ninety days after the completion of such building, structure or improvement.[8]

The legislature in 1893 enacted section 1203 as a section to the Code of Civil Procedure.

By the provisions of that section, every contract required to be filed under the provisions of section 1183 of that code must be accompanied by a good and sufficient bond in an amount equal to at least twenty-five per cent. of the contract price for the work, and this bond must be filed with the contract or the memorandum hereof. This bond, by its terms, must inure to the benefit of all persons other than the original contractor, who would be entitled to a lien under the provisions of said section 1183 of the Code of Civil Procedure on the real estate mentioned in the contract. If such bond be not given, then the owner and contractor will be jointly and severally liable in damages to any and all material-men, laborers and sub-contractors, entitled to a lien upon the real estate affected by the contract.

The right to file a mechanic's or laborer's lien is personal and not assignable.[9]

This rule, that the right to file and enforce such lien, is not assignable, does not apply to a partnership making the assignment to a member of the co-partnership firm.[10]

The owner of real estate, who has made a contract for the construction of an improvement thereon, when there are lien claimants, other than the contractor, and there is a contest between them for the unpaid portion of the contract price for the

8. Code of Civil Procedure, Sec. 1187, as amended in 1897.
9. Mills v. La Verne Land Co., 97 Cal. 254; McCrea v. Johnson, 104 Cal. 224.
10. Pacific M. L. Co. v. Fisher, 109 Cal. 566.

improvement, should pay such unpaid portion of the contract price, into court, for such lien claimants as may show they are entitled thereto.[11]

A lien under the mechanics' lien law of California can be maintained only by a substantial observance of the provisions of the statute.[12]

Preferred liens for salaries and wages, under the provisions of the Code of Civil Procedure, sections 1204-1207, are given by statute and can be maintained only by a substantial observance of the provisions of the statute.

11. De Camp L. Co. v. Tolhurst, 99 Cal. 631.
12. Wood v. Wrede, 46 Cal. 637.

CHAPTER XLVI.

OF CONTEMPTS.

A court has the inherent power in the absence of a limitation placed upon it by the power which created it, to punish as a contempt any act which tends to impede, embarrass or obstruct the court in the discharge of its duties, regardless of the fact whether or not the act is committed in or out of its presence.[1]

But the finding of a court, in a proceeding to punish the editor of a newspaper for a contempt for the publication of evidence on the trial of a divorce suit in that court, that the publication was an unlawful interference with the proceedings of the court, is not conclusive when such finding is based on evidence, and when it appears from all the facts found that such publication could not have been a contempt of the court.[2]

Courts of equity have used proceedings for a contempt for the purpose of compelling a party to pay money which he has been directed by the decree or order of the court to pay, as well as to enforce obedience to a decree directing the performance of some other act.[3]

Every court (including justices' court) has power to compel obedience to its lawful judgments, orders and process, and to the orders of a judge out of court, in an action or proceeding therein.[4]

In the case Ex parte Latimer, the petitioner was imprisoned under the order of a justices' court, made in proceedings supplemental to execution.

1. In re Shortridge, 99 Cal. 526.
2. In re Shortridge, 99 Cal. 526.
3. Galland v. Galland, 44 Cal. 477.
4. Code of Civil Procedure, Sec. 128, Sub. 4; Ex parte Latimer, 47 Cal. 131.

A private corporation can be punished for contempt for disobeying an injunction.[5]

An executor as a trustee for heirs and creditors, and as an officer of the court, is subject to an attachment for a contempt.[6]

The facts stated in a judgment for a conviction for contempt are conclusive and the sufficiency of the evidence to support them cannot be reviewed on *habeas corpus.*[7]

The execution of a void judgment for a contempt will be stayed by a writ of prohibition.[8]

Errors in the rulings of a court in proceedings for a contempt of court cannot be reviewed on certiorari.[9]

The publication in a newspaper, during the pendency of a proceeding in a court, which charged the judge holding such court with deliberately lying about the law, deliberate falsification in his official capacity and deliberate intentional denial of justice in a case on trial before him, the case not having been finally disposed of, is a contempt of court.[10]

If a commitment for contempt be against law, as being made for a matter for which, by law, no man ought to be punished for a contempt of a court, the person so committed will be discharged on habeas corpus,[11] and the enforcement of the commitment may be stayed by a writ of prohibition.[12]

A party should not be punished for a contempt of court for failure to do an act which by an order of the court he was directed to do, and which he was not able to do, unless he has voluntarily created such disability.[13]

A party who has been committed for contempt of court for failure to pay money directed by an order of court to be paid by him, is entitled to be discharged from imprisonment for such contempt under the provisions of sections 1143-1154 of the Code

5. Golden Gate M. Co. v. Superior Court, 65 Cal. 190.
6. Ex parte Smith, 53 Cal. 204.
7. Ex parte Clark, 110 Cal. 405; Ex parte Acock, 84 Cal. 50.
8. Crosby v. Superior Court, 110 Cal. 45.
9. White v. Superior Court, 110 Cal. 60.
10. Ex parte Barry, 85 Cal. 603.
11. Ex parte Hollis, 59 Cal. 405; Ex parte Kearney, 55 Cal. 212; Ex parte Gordan, 92 Cal. 478; Ex parte Siebold, 100 U. S. 310; Ex parte Brown, 97 Cal. 83.
12. Williams v. Dwinelle, 51 Cal. 442; Brown v. Moon, 61 Cal. 432; Gordan v. Buckles, 92 Cal. 481.
13. Galland v. Galland, 44 Cal. 475.

of Civil Procedure as a person imprisoned on civil process, if the facts be such that he is entitled to be discharged from such imprisonment as in said sections provided.[14]

The determination of a court as to the existence of facts, the existence of which is necessary to confer jurisdiction to punish for contempt are conclusive.[15]

The refusal of a witness to answer a question not pertinent to the issues on trial is not a contempt of court.[16]

Deceit, or abuse of the process, or proceedings of the court, by a party to an action or special proceeding therein, is a contempt of court.[17]

A grand jury is a part of the court by which it is impanelled, and the writing and sending of threatening and insulting letters to a grand jury is a contempt of the court by which such jury was impanelled.[18]

A party to an action cannot be punished for a contempt for disobeying a mandatory injunction against him, during the pendency of an appeal from the judgment decreeing such mandatory injunction, when an undertaking on the appeal was such that it operated as a stay of proceedings for the enforcement of such judgment.[19]

One who obstructs and takes from a police officer, by means of legal process, property taken by such officer, under a search warrant issued by a judge of a Superior Court, for the purposes of having such property as evidence, is guilty of contempt.[20]

A party to a proceeding against himself for a contempt, is not guilty of contempt by reason of his refusal to be sworn and testify as a witness in such proceeding.[21]

After a final judgment has been rendered in a contempt proceeding, the court has no jurisdiction to enter another and different judgment in the same matter.[22]

14. In re Wilson, 75 Cal. 580.
15. Ex parte Sternes, 77 Cal. 156.
16. Ex parte Zeehandelaar, 71 Cal. 238.
17. Ex parte Acock, 84 Cal. 50.
18. Ex parte Tyler, 64 Cal. 434.
19. Dewey v. Superior Court, 81 Cal. 64.
20. Ex parte Lowenthal, 74 Cal. 109.
21. Ex parte Gould, 99 Cal. 360.
22. Barry v. Superior Court, 91 Cal. 486.

A court loses jurisdiction to punish for an alleged contempt committed in its presence, when there is an unreasonable delay in taking proceedings for the punishment of such contempt.[23]

A prosecution for a contempt may be in the cause or proceeding out of which the contempt arose.[24]

After final judgment of conviction for a contempt, the jurisdiction of the court to render such judgment cannot be questioned on habeas corpus, if the prisoner was actually taken before the court and given an opportunity to defend by an inquiry as to the manner in which the accused was brought before the court.[25]

The recitals of the jurisdictional facts in a judgment of conviction for a contempt cannot, on habeas corpus, be attacked by evidence, dehors the record.[26]

A county treasurer cannot be punished for contempt for not obeying an order of a court directing him to pay money to a witness, without some proceedings, to which the treasurer is made a party.[27]

Unless a contempt be committed in the immediate view or presence of the court or judge, such court or judge has no jurisdiction to render a judgment convicting a person of such contempt, unless such person has had notice and an opportunity to show cause why he should not be punished for such contempt.[28]

Before a person can be punished for a contempt for not complying with an order of the court, such order should be served on him, unless he was present in court when the order was made, or otherwise has notice of such order.[29] [30]

When the officers of a corporation charged with contempt in disobeying a legal order made in an action to which such corporation is a party, wilfully conceal themselves in order to avoid service of an order to show cause why it should not be adjudged

23. In re Foote, 76 Cal. 543.
24. Ex parte Ah Men, 77 Cal. 198.
25. Ex parte Ah Men, 77 Cal. 202.
26. Ex parte Ah Men, 77 Cal. 202.
27. Sargent v. Cavis, 36 Cal. 552.
28. Ex parte Rush, 60 Cal. 5.
29. Johnson v. Superior Court, 63 Cal. 578.
30. Ex parte Cottrell, 59 Cal. 420.

guilty of a contempt, the court may order that such service be made on its attorney in the action.[31]

Unless the contempt be committed in the immediate view and presence of the court, or an affidavit be presented to the court showing facts which constitute the contempt, or there be a statement of such facts by the referee, arbitrators, or other judicial officer, the court has no jurisdiction to punish a person for such contempt.[32]

An ex parte affidavit may set the proceedings for a contempt in motion, and the judgment punishing for a contempt may be based on evidence produced on the hearing, and any irregularity in the affidavit presented to the court and which sets the proceedings in motion, does not affect the jurisdiction of the court to render a judgment of conviction for the alleged contempt.[33]

The court imposing a fine for a contempt has power to make and enforce a judgment, that, in default of payment of the fine, the party in contempt be imprisoned in satisfaction of the fine until the fine is satisfied at the rate of one day's imprisonment for each two dollars of the fine unpaid.[34]

The court may on the affidavit to set proceedings in motion for an alleged contempt grant an order that the person charged with such alleged contempt show cause at a time and place fixed in the order, why he should not be punished for the alleged contempt, or may grant a warrant of attachment to bring the person charged with such contempt before the court to answer the charge; and at the time and place fixed by the order, if the person be served with such order, or at the time the person so charged is brought or appears before the court to answer the charge, evidence may be introduced in support of such charge, or to controvert it, and after hearing the evidence, the

31. Golden Gate M. Co. v. Superior Court, 65 Cal. 187; Eureka Canal Co. v. Superior Court, 66 Cal. 311.
32. Code of Civil Procedure, Sec. 1211; Batchelder v. Moore, 42 Cal. 412
33. Golden Gate M. Co. v. Superior Court, 65 Cal. 191.
34. Ex parte Abbott, 94 Cal. 333.

court on such evidence may render judgment of conviction or acquittal.

When there is an order to show cause merely, the person charged with the contempt need not be present at the hearing.[35]

35. Code of Civil Procedure, Secs. 1211, 1212, 1217; Ex parte Gordan, 92 Cal. 478.

CHAPTER XLVII.

EMINENT DOMAIN.

The right to take private property for public uses, that is, the right of eminent domain, is inherent in government;[1] and this right may be delegated by the legislature to any corporation or any individuals, who comply with the terms upon which such right is given and delegated.[2]

The right of a person to enjoy the flow of water in its natural channel may be condemned for public use.[3]

The right to private property cannot be condemned for a private use.[4]

The legislature, as a general rule, has the right to determine what shall be held to be a public use, and its action, as to such matters, is not, except in extreme cases, open to review by the courts.[5]

The right of a private corporation to condemn private lands for public use is limited to cases in which real necessity exists for such condemnation.[6]

But this necessity is not required to be an absolute necessity.[7]

When a municipal corporation has decided that a sewer is desirable, it is only required, in a proceeding to condemn land

1. Gilman v. Lime Point, 18 Cal. 229.
2. Moran v. Ross, 79 Cal. 159; S. P. R. R. Co. v. S. Cal. Ry. Co., 111 Cal. 221.
3. St. Helena Water Co. v. Forbes, 62 Cal. 182.
4. Consolidated Channel Co. v. C. P. R. R. Co. 51 Cal. 269; Lorens v. Jacob, 63 Cal. 73; Amador Q. M. Co. v. Dewitt, 73 Cal. 482.
5. City of Santa Ana v. Harlin, 99 Cal. 538; S. & V. R. R. Co. v. City of Stockton, 41 Cal. 147; Lindsay Ir. Co. v. Mehrtens, 97 Cal. 676; Contra Costa R. R. Co. v. Moss, 28 Cal. 323; San Francisco R. R. Co. v. Caldwell, 31 Cal. 367; City of Pasadena v. Stimson, 91 Cal. 238.
6. Spring Valley W. W. v. San Mateo W. W., 64 Cal. 123.
7. Rialto Irr. Dist. v. Brandon, 103 Cal. 384.

for such sewer, to prove that the taking of the property sought to be condemned, is necessary for the construction of such sewer.[8]

The determination in respect to the exercise of this right of eminent domain, and as to what land should be taken in the exercise of such right is a political and legislative question, and it is not a judicial question, except so far as the same is so made by the legislature.[9]

Since the adoption of the codes of California, a corporation may institute proceedings for the condemnation of land in the cases provided by the codes, without any previous efforts to agree with the owner of such lands as to the amount of compensation to be paid therefore.[10]

It was held by the Supreme Court of California before the adoption of the codes in that state, that the provisions of a statute for the condemnation of lands for a public use must be strictly followed and the statute allowing such condemnation must be strictly construed.[11]

Since the adoption of the codes, the Supreme Court of that state has held that proceedings for condemning land for a public use must conform to the statute regulating the exercise of the power of eminent domain.[12]

The constitution of 1879 of California provides that private property shall not be taken or damaged for a public use without just compensation having been first made to or paid into court for the owner, and that no right of way shall be appropriated to the use of any corporation, other than a municipal corporation, until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, as shall be prescribed by law unless a jury be waived, as in other civil cases in a court of record.

It was at one time held in California that land is not taken for a public use in the sense in which the word "taken" is used in the constitution until the last act had been performed, which,

8. City of Pasadena v. Stimson, 91 Cal. 248, 249.
9. Wilson v. Supervisors, 101 Cal. 15.
10. City of Pasadena v. Stimson, 91 Cal. 248, 249.
11. Curran v. Shattuck, 24 Cal. 427.
12. County of Ventura v. Thompson, 51 Cal. 577.

under the mode of condemnation adopted, is required to transfer the title, or subject it to the servitude;[13] and it was subsequently held that the occupation of land by a corporation for its own purposes pending proceedings for a condemnation, was a "taking" of the property within the meaning of the constitution.[14]

The right of the state to *take* private property for a public use does not depend upon any contract between the owner and the public and there is no vested right to the compensation until the property is taken and the government is under no obligation to take the property if the terms when ascertained, are not satisfactory.[15]

If private property be in fact taken, or damaged, for a public use, the owner of such property can maintain an action to recover compensation therefor, and for the injury caused by such taking.[16]

A mere infringement on the *personal* enjoyment or pleasure of the owner of the property, so taken, or the rendering of such property less desirable for certain purposes, or the causing of *personal* annoyance or discomfort, does not constitute a damage for which compensation is to be made, but the property itself must be damaged, or be rendered intrinsically less valuable, by the public use.[17]

Evidence to show the comparative value of the *use* of the property taken for a public *use*, before and after the property is so taken, is not admissible in an action to recover compensation for such taking.[18]

If, in an action to condemn a right of way, damages are assessed and paid into court for the defendant, and the defendant received the money so paid into court, abandoned all defenses in the action except a claim for greater compensation for taking the property, and moved for a new trial, then in case of failure to obtain on such new trial, a greater compensation than was

13. Fox v. Western P. R. R. Co., 31 Cal. 538.
14. San Mateo Water Works v. Sharpstein, 50 Cal. 284; Sanborn v. Belden, 51 Cal. 266.
15. Lamb v. Schottler, 54 Cal. 319.
16. Tyler v. Tehama County, 109 Cal. 618.
17. Eachus v. Los Angeles Ry. Co., 103 Cal. 614.
18. Los Angeles P. & G. Ry. Co. v. Rumpp, 104 Cal. 20.

allowed on the first trial, the costs of such new trial must be, under the provisions of section 1254 of the Code of Civil Procedure, taxed against the defendant.[19]

Counsel fees of a defendant in an action for the condemnation of land are not allowable in a general judgment for the defendant in such action.[20]

In actions for the condemnation of land for public use, the right thereto, for the purposes of assessing compensation and damages, shall be deemed to have accrued at the date of the summons, and its actual value at that date shall be the measure of compensation for all property actually taken, and the basis of damages to property not actually taken but which is injuriously affected by the taking.[21]

A Superior Court in California has jurisdiction under the constitution and general laws of that state of the proceedings for the condemnation of lands for public use.[22]

The complaint in a proceeding to condemn a right of way for a railroad company must contain a description of each piece of land sought to be taken under such proceedings and must show whether the same includes all or only a part of an entire tract.[23]

In a proceeding to condemn water rights, and land, for a public use, the complaint should state facts showing that the use for which the condemnation is sought is a public use, and showing definitely what water rights are sought to be condemned.[24]

The provisions of section 1254 of the Code of Civil Procedure in respect to the payment of money into court, in an action for condemnation of land, and for the possession of the land sought to be condemned during the pendency of the action, under an order of the trial court, or of a judge thereof, are not unconstitutional.[25]

In condemnation proceedings to take land for a public

19. Los Angeles P. & G. Ry. Co. v. Rumpp, 104 Cal. 20.
20. Coburn v. Townsend, 103 Cal. 233.
21. Code of Civil Procedure, Sec. 1249; Pacific C. Ry Co. v. Porter, 74 Cal. 261; San Jose etc. v. Mayne, 83 Cal. 566.
22. Bishop v. Superior Court, 87 Cal. 226.
23. California Cent. Ry. Co. v. Hooker, 76 Cal. 404.
24. Aliso Water Co. v. Baker, 95 Cal. 268.
25. Spring Valley W. W. Co. v. Drinkhouse, 95 Cal. 220, 223.

use the party seeking condemnation should be required to pay not only his own costs, but also all proper costs of the owners of the land, incurred in good faith and a different rule would be contrary to the provisions of section 14 of article I of the constitution.[26]

Proceedings to condemn land for the purposes of a "private road" may be brought in the name of the county.[27]

The owner of land sought to be condemned for a public use should allege in his answer the value of such land, and the burden of proof as to the value of such land is on the owner.[28]

Where by taking for a public use a part of a tract of land, additional fences will be required for the reasonable use of the remainder of the tract, the costs of such additional fencing is an element of damage, but such costs would not be an element of damage if such fencing would not be required for the reasonable use of the remainder of the land.[29]

In an action to condemn a right of way for a railroad, the value of improvements placed in good faith on the land by the railroad company or its predecessor in interest, before the commencement of the proceedings, are not to be considered in awarding compensation to the owner of the land.[30]

But if the government wrongfully takes possession of land and constructs a building thereon against the will of the owner the value of such building may be considered in estimating the compensation to be paid such owner in subsequent proceedings by the government to condemn the land so taken possession of, for a public use.[31]

In a proceeding by a railroad company to condemn a strip of land for a right of way for its road, the compensation awarded to the owner must be ascertained irrespective of any benefit

26. City and County of San Francisco v. Collins, 98 Cal. 259.
27. Monterey County v. Cushing, 83 Cal. 507.
28. San Diego L. & T. Co. v. Neale, 88 Cal. 50; Monterey County v. Cushing, 83 Cal. 507.
29. Colusa County v. Hudson, 85 Cal. 633.
30. San Francisco etc. R. R. Co. v. Taylor, 86 Cal. 246; California S. R. R. Co. v. Southern P. R. R. Co., 67 Cal. 59; Albion R. R. R. Co. v. Hesser, 84 Cal. 435; California Pac. R. R. Co. v. Armstrong, 46 Cal. 85.
31. United States v. Jack, 47 Cal. 515.

which accrues to the remainder of his land from a building of the road.[32]

This rule, however, does not apply to a case of condemnation of land by a private individual for a railroad, although such condemnation is for a public use.[33]

In proceedings for condemnation of land the market value of the land taken, when the summons in proceedings for such condemnation was issued, is the measure of damages and not its real value in use to the owner or to the party seeking to condemn it;[34] but the owner of the land is entitled to its market value to be determined in view of all the facts which would naturally affect its value in the minds of purchasers generally.[35]

By the term market value is meant what price the owner of the land could obtain for it after a reasonable and ample time; such as would ordinarily be taken by an owner, to make a sale of like property.

The general rule in estimating the market value of property is that it is not competent for the owner to prove on direct examination of a witness, by the witness, what the owner has been offered for the property, nor to prove what persons looking for similar property were willing to give for it.[36]

The signing of an assessment list by a defendant with a valuation attached to the property is not a declaration by him as to the value of the land sought to be condemned.[37]

The use of a public street in a city for general railway purposes, imposes no new burden or servitude upon the owner of the abutting land; and the object of the use, being within the conceded rights of the public, the methods for its accomplishment are subject to legislative control; but there may be an action for damages by an abutting owner whose rights of ingress to or egress from the land or right to light and air, shall be interfered with.[38]

When a railroad company constructs its road upon and

32. Pacific C. Ry. v. Porter, 74 Cal. 261; San Bernardino Ry. Co. v. Haven, 94 Cal. 489.
33. Moran v. Ross, 79 Cal. 549.
34. San Diego L. & T. Co. v. Neale, 88 Cal. 50.
35. Spring Valley W. W. Co. v. Drinkhouse, 92 Cal. 528.
36. Santa Ana v. Harlin, 99 Cal. 544, 539.
37. San Jose etc. R. R. Co. v. Mayne, 83 Cal. 566.
38. Montgomery v. Railway Co. 104 Cal. 186.

along a public street under an authority of the proper municipal authority so to do, the railroad must pay to the owner of the land and lots abutting on such street the damage sustained by such owner by reason of the diminished value of such lot, from the obstruction to the egress from an ingress to such land and lot from and along such street, caused by the construction of such road.[39]

39. Eachus v. Los Angeles R. R. Co., 103 Cal. 614.

CHAPTER XLVIII.

OF ESTATES OF DECEASED PERSONS AND OF THE APPOINTMENT OF ADMINISTRATORS AND EXECUTORS.

Every person over the age of eighteen years, of sound mind, may, by his last will, dispose of his estate, real and personal, such estate being chargeable with all the decedent's debts.[1]

The property, both real and personal, of one who dies without disposing of it by will, passes to the heirs of the intestate, subject to the control of the probate court, and to the possession of any administrator appointed by that court for the purposes of administration.[2]

By the constitution of California, Superior Courts have jurisdiction of all matters of probate.[3]

In some states, probate courts established by law have such jurisdiction.

The probate jurisdiction of a Superior Court is separate and distinct from its jurisdiction in ordinary civil actions.[4]

Probate proceedings are proceedings in rem.[5]

Although in probate proceedings, the court derives its authority from the constitution, such proceedings are purely statutory.[6]

Wills must be proved, and letters testamentary and of administration granted in and by a court having probate jurisdiction as follows:

1. In case the decedent was a resident of the state at

1. Civil Code 1270.
2. Civil Code, Sec. 1384.
3. Art. VI, Sec. 5; Burris v. Kennedy, 108 Cal. 331.
4. In re Alger, 65 Cal. 228.
5. Burris v. Kennedy, 108 Cal. 331.
6. Burris v. Kennedy, 108 Cal. 331; Maddock v. Russell, 109 Cal 417.

the time of his death, in the court of the county, in which he was a resident.

2. In the case in which the decedent died in this state, but was not a resident of this state, but left estate therein, in the court of the county in which he died, if he left estate in that county.

3. In the case of the decedent who was not a resident of this state, and died out of the state, in the court of any county of the state in which he left any estate.

4. In the case of a decedent who was not a resident of this state, but died in the state, leaving estate in the state, but not in the county in which he died, in the court of any county of the state in which any part of his estate may be.

5. In all other cases in the court of the county in which the application for letters, is first made.[7]

The courts referred to are courts having probate jurisdiction.

In California, every custodian of a will of a decedent is required to deliver such will, within thirty days after receiving information that the maker thereof is dead, to the Superior Court having jurisdiction of the estate or to the executor named in the will. The person named in the will as the executor must, within thirty days after he has knowledge of the death of the testator, and that he is named as executor, petition the court having jurisdiction of the estate for the probate of the will, and that letters testamentary be issued to him, or he may be held to have waived his right to letters, and the court may appoint any other competent person, an administrator with the will annexed. The petition for the probate of the will should state that the decedent died leaving a last will and facts mentioned in section 1294 of the Code of Civil Procedure, which, if they exist, would give to the court jurisdiction of the estate. The statement of such facts is jurisdictional. On the filing of the petition and the will, the clerk of the court must set the petition for hearing by the court upon some day not less than ten days nor more than thirty days from the production of the will, and must give notice of the hearing by publishing such notice in a

7. Code of Civil Procedure, Sec. 1294.

newspaper of the county; or, if there be no newspaper printed in the county then the clerk must give notice of the hearing by posting notice thereof in at least three of the most public places in the county. If the notice be given by publication in a newspaper, the notice must appear in the newspaper on at least three different days of publication, and there should be at least ten days from the first to the last day of publication, both the first and the last day included; if the notice be given by posting the notice, it must be so given at least ten days before the hearing.

The petition should state besides the jurisdictional facts, whether the executor named in the will consents to act, the names, ages, and residence of the heirs and devisees, of the decedent so far as known to the petitioner, the probable value and character of the property of the estate, and the name of the person for whom letters testamentary are prayed, but no defect of form or in the statement of jurisdictional facts actually existing shall make void the probate of the will. Copies of the notice of the time appointed for the probate of the will must be addressed to the heirs of the decedent resident in the state, at their places of residence, if known to the petitioner, and deposited in the postoffice, postage prepaid, at least ten days before the hearing. If their places of residence be not known, the copies of the notice may be addressed to them, and deposited in the postoffice at the county seat of the county where the proceedings are pending. A copy of the notice must be mailed to persons named as executors, if they are not the petitioners, if their places of residence be known. Personal service of copies of the notice ten days before the hearing is equivalent to mailing.(a) The court or a judge thereof may compel the production of a will.(b)

A petition for letters of administration on the estate of a deceased person must show that the decedent died intestate, and the jurisdictional facts, and when known to the applicant, the petitioner should state in the petition, the names, ages and residences of the heirs of the decedent, and the value and character of the property of the estate, and facts showing the right of the petitioner to letters of administration. If the jurisdictional facts

a. Code of Civil Procedure, Sec. 1294-1305, Sec. 1356.
b. Code of Civil Procedure, Sec. 1305.

existed, and are afterwards proved, the decree or order of administration and the subsequent proceedings are not void.

When the petition for letters of administration is filed the clerk of the court must set the petition for hearing by the court, and give notice thereof by causing notices to be posted in at least three public places in the county, one of which must be at the place where the court is held, containing the name of the decedent, the name of the applicant, and the time at which the application will be heard. Such notice must be given at least ten days before the hearing; the application for letters may be contested on the hearing, it being first proven that notice has been given of the hearing; the court will hear the allegations and proofs of the parties and order the issuance of letters of administration to the party best entitled thereto, and an entry in the minutes of the court that the required proof was made and notice given shall be conclusive evidence of the fact of such notice. (c)

The Code of Civil Procedure, sections 1322, 1324, provides for the probate of foreign wills; and that code, sections 1327 1333, provides for the contesting of wills after probate and the same code, sections 1338, 1346, provides for the probate of lost or destroyed wills and of nuncupative wills.

When a petition for letters of administration sets forth all of the jurisdictional facts, the order of the court granting letters, cannot be attacked collaterally.[7a]

There cannot be at the same time two valid administrations of the estate of a decedent, and the court which first, by proper proceedings gets jurisdiction of the case has the authority to act.[8]

The amount and value of the estate of a decedent are not jurisdictional facts.[9]

No notice for letters of administration need be given other than the notice prescribed by statute.[10]

When the right for letters is contested, the determination of the court on such contest as to the right to such letters cannot be collaterally attacked.[11]

c. Code of Civil Procedure, Sec. 1371-1376.
7a. Estate of Griffith, 84 Cal. 107; Estate of Scriber, 18 Cal. 499.
8. Estate of Griffith, 84 Cal. 110.
9. Lucas v. Todd, 28 Cal. 182.
10. Estate of Griffith, 84 Cal. 107.
11. Howell v. Budd, 91 Cal. 342; Garwood v. Garwood, 29 Cal. 514.

While one administrator of an estate is in office there is no power in the probate judge or court to appoint a new one.[12]

But if after the issuing of letters of administration on the estate of a decedent, a will of the decedent is admitted to probate, and letters of administration with such will annexed is granted to another person, who qualifies, the authority of the first administrator is superseded by the appointment of the last administrator, although no order was made discharging such first administrator from his trust.[13]

The court has no right to adjudge a person incompetent to act as an executor or administrator unless he is within one of the classes of persons expressly declared by statute to be incompetent.[14]

While the court is authorized to refuse to appoint an executor named in the will of the decedent, for want of integrity, yet this power should not be exercised except upon clear and convincing testimony establishing such disqualifying fact.[15]

All acts of an executor or administrator as such, before the revocation of his letters testamentary or of administration are as valid to all intents and purposes, as if such executor or administrator had continued lawfully to execute the duties of his trust.[16]

An ex parte order appointing a special administrator of the estate of a decedent does not operate as a removal of an executrix previously appointed.[17]

Administration upon the estate of a living person is totally void.[18]

No person, unless he is a bona fide resident of the state, is competent or entitled to serve as an administrator.[19]

Administration may be granted to a competent person on the written request of the surviving husband or wife entitled thereto.[20]

Administration may be granted to a competent person on the

12. Estate of Hamilton, 34 Cal. 464; Haynes v. Meeks, 20 Cal. 288.
13. McCauley v. Harvey, 49 Cal. 497.
14. Estate of Bauquier, 88 Cal. 303; Estate of Pacheco, 23 Cal. 476.
15. Estate of Bauquier, 88 Cal. 308.
16. Code of Civil Procedure, Sec. 1428.
17. Schroeder v. Superior Court, 70 Cal. 343.
18. Stevenson v. Superior Court, 62 Cal. 60.
19. Code of Civil Procedure, Sec. 1369, Sub. 2.
20. Code of Civil Procedure, Sec. 1379.

written request of the surviving husband or wife,[21] although such surviving husband or wife was not entitled to such letters.[22] In no case other than that of a surviving husband or wife will administration be granted to any person not entitled thereto, except on the written request of a person who is himself entitled thereto.[23]

A written request for the appointment of a person as administrator of the estate of a decedent, made by one who is entitled to letters of administration on that estate, is a waiver and relinquishment to the person whose appointment is so requested, of the right to such appointment of the person making such request.[24]

A non-resident who is named as executor in a will may apply, through his attorney, for such letters and be appointed the executor of such will, but he must within a reasonable time, thereafter submit himself to the jurisdiction of the court making the appointment, and must personally conduct the settlemen of the estate.[25]

A person who was not a partner of a decedent at the time of his death, but who had been such partner, is not entitled to letters of administration on the estate of the decedent, if there remain unsettled matters growing out of the partnership transactions between them while they were partners.[26]

A brother of a decedent otherwise entitled as such brother, to letters of administration on the estate of such decedent, is not entitled to such letters if he was a partner of the decedent at the time of his death.[27]

The guardian of a minor heir of a decedent, cannot by his written request confer on another person the right of the guardian to administer on the estate of the decendent.[28]

The surviving wife, who, at the time of the death of her husband, was living apart from him pursuant to written articles of separation, whereby they agreed to divide their property and

21. Code of Civil Procedure, Sec. 1365, Sub. 1.
22. Estate of Stevenson, 72 Cal. 164.
23. Estate of Bedell, 97 Cal. 339; Estate of Beach, 63 Cal. 458.
24. Estate of Bedell, 97 Cal. 339; Estate of Kirtlan, 16 Cal. 161.
25. Estate of Brown, 80 Cal. 381.
26. Estate of Garber, 74 Cal. 338.
27. Cornell v. Gallaher, 16 Cal. 367.
28. Estate of Woods, 97 Cal. 428.

relinquish all claims of every nature upon the property of each other then owned or thereafter to be acquired, and to immediately separate and live apart from each other during their natural lives, and they did immediately separate and thereafter lived apart from each other, and all of the terms of said articles of separation to be kept and performed by the husband were fully executed and carried out by him, is not, nor is her nominee, entitled to letters of administration on the estate of the deceased husband.[29]

Neither the father or brother of a decedent, unless such father or brother be a bona fide resident of the state, nor his nominee is entitled to letters of administration on the estate of such decedent.[30]

A citizen and resident of the state, who is named as a devisee in the will of a decedent and petitions for the probate of a foreign will and for letters of administration with such will annexed. on the estate of the decedent, is entitled to such letters as against the claim of a public administrator.[31]

Neither a testamentary executor nor a testamentary guardian is entitled to act as such, until he qualifies, and letters testamentary or of guardianship are issued to him.[32]

A person named as an executor in a will, but who never qualified as such executor, is not a trustee of the estate of a decedent, and he is not chargeable as such trustee, for the profits from a contract purchased by him in good faith from the executrix of such will, who has qualified, when the sale was made to him, at the time it was made, was fair and just, upon a sufficient consideration, and was for the best interests of the estate.[33]

An executor may, after he has resigned his trust, be compelled to account with the estate for the value of personal property converted by him, which he had neglected to include in his prior accounts.[34]

An order of a probate court accepting the resignation of an

29. Estate of Davis, 106 Cal. 453.
30. Estate of Donovan, 104 Cal. 623; Estate of Muersing, 103 Cal. 585.
31. Estate of Bergin, 100 Cal. 376.
32. Aldrich v. Willis, 55 Cal. 81.
33. Bowden v. Pierce, 73 Cal. 459.
34. Estate of Radovich, 74 Cal. 536.

executor and discharging him from his trust, cannot be collaterally attacked.[35]

When a probate court has jurisdiction of any matters in the settlement of the estate of a decedent, the presumptions are in favor of the regularity of its proceedings and the validity of its orders as to such matters.[36]

The court cannot remove an administrator or executor without giving him an opportunity to be heard.[37]

The marriage of an executrix of a will, under the law in California as it was prior to 1891, did not cause her powers of executrix to cease, until there was an order of the probate court for her removal.[38]

By amendments in 1891 of sections 1352 and 1370 of the Code of Civil Procedure, a married woman can be appointed an executrix or an administratrix, and her marriage subsequent to such appointment does not extinguish such appointment.

The fact that a person who is the administrator of an estate of a decedent was adjudged to be insane, and was committed to an insane asylum does not make vacant his office as the administrator of such estate.[39]

Under the probate law as it was before the adoption of the codes, after such adjudication of insanity, and before the restoration of such person to competency as a sane person, another administrator of the estate could be appointed, without the service of a citation upon the person adjudged to be insane.[40]

A person sentenced for a felony for a term less than for life is not civilly dead;[41] and when the person so sentenced for a term less than for life, is an administrator of the estate of a decedent, and his letters as such administrator have not been revoked, he may after such sentence be legally served with a notice of appeal in an action in which he was sued as such administrator, and the judgment was in his favor.[42]

All acts of a Superior Court in proceedings for the admin-

35. Luco v. Commercial Bank, 70 Cal. 339.
36. Luco v. Commercial Bank, 70 Cal. 342.
37. Estate of Moore, 83 Cal. 584.
38. McMillan v. Hayward, 94 Cal. 357.
39. Estate of Moore, 68 Cal. 281.
40. Estate of Blinn, 99 Cal. 216.
41. Estate of Nerac, 35 Cal. 39.
42. Brown v. Mann, 68 Cal. 517.

istration and distribution of the estate of a decedent in excess of the statutory power conferred on the court are void.[43]

Most of the general powers of a probate court over testamentary and probate matters belonged to a court of chancery, which still retains its jurisdiction over such matters, and a Superior Court in exercise of its chancery jurisdiction may take jurisdiction of the settlement of an estate when the existence of facts be shown, which would render the exercise of such jurisdiction proper.[44]

An order admitting a will to probate is not conclusive until the expiration of one year after such order was made, and as against persons who were infants or persons of unsound mind, at the time of such order, until the expiration of one year after such disability is removed.[45]

Before letters testamentary or of administration are issued to an executor or administrator, he must take an oath of office as such administrator or executor and execute a bond.[46]

When, however, it is expressly provided in a will admitted to probate that no bond shall be required of an executor no bond shall be required, unless the court for good cause requires that a bond be given by such executor.[47]

A special administrator of the estate of a deceased person may be appointed as provided in sections 1411, 1414 of the Code of Civil Procedure.

43. Smith v. Westerfield, 88 Cal. 374.
44. Deck v. Gerke, 12 Cal. 433.
45. Code of Civil Procedure, Sec. 1333.
46. Code of Civil Procedure, Secs. 1387 and 1388.
47. Code of Civil Procedure, Sec. 1396.

CHAPTER XLIX.

OF THE INVENTORY AND OF THE TITLE AND RIGHT OF POSSESSION OF THE EXECUTOR OR ADMINISTRATOR TO THE ESTATE OF A DECEDENT.

Every executor or administrator must within three months after his appointment, make and return to the court a true inventory and appraisement of all the estate of the decedent, including the homestead, if any, which has come to his possession or knowledge.[1]

And this inventory should state, so far as it can be ascertained, what portion of the property of the decedent is separate property, and what portion is community property.[2]

If the whole estate of the decedent consists of money there need be no appraisement, but an inventory must be returned.[3]

Such inventory and the appraisement, when an appraisement is required, must be returned and filed in the court within three months after letters testamentary or of administration are granted, or within such further time, not exceeding two months, which the court or judge, for reasonable cause may allow, otherwise such letters may be revoked.[4]

The naming of a person as executor does not discharge the executor from any just claim of a decedent against such executor, and a discharge or bequest in a will of a demand of the decedent against any person is invalid as against the creditors of a decedent so far as such demand is necessary for the payment of the debts of such decedent.[5]

The clause in section 1443 of the Code of Civil Procedure

1. Code of Civil Procedure, Sec. 1443.
2. Code of Civil Procedure, Sec. 1445.
3. Code of Civil Procedure, Sec. 1445.
4. Code of Civil Procedure, Sec. 1450.
5. Code of Civil Procedure, Secs. 1447, 1448.

requiring the inventory of the estate of a decedent to be made and returned by an executor or administrator of such decedent within three months after the appointment of such executor or administrator does not make invalid an inventory made and returned after said period of three months.[6]

An inventory is returned within the meaning of section 1443 of the Code of Civil Procedure when it has been completed by the appraisers and presented to the court or judge for information, and as a basis for some judicial action to be taken in the proceeding for the settlement of the estate to which it relates.[7]

The inventory of the estate of a decedent is not competent evidence for a defendant in an action to recover the possession of real estate brought by a plaintiff claiming title to such real estate under proceedings had in the estate of said decedent to show that such defendant was an adverse claimant of such real estate at the time the inventory was returned.[8]

An inventory and appraisement of the estate of a decedent is in an action by a devisee against the executor, for damages for loss of estate devised to him by such decedent, prima facie evidence of the value of that portion of the estate of the decedent which is therein specifically described and appraised, but is not evidence of the value of a portion of the estate which is not therein specifically described and appraised.[9]

The petition of a person for letters of administration on the estate of a decedent, and his appointment on such petition, and his return of an inventory stating and showing that certain property was a part of the estate of the decedent, does not estop the person so petitioning and so returning such inventory from showing that such property was in fact his own property.[10]

It is within the judicial discretion of the court having jurisdiction of the estate of a decedent to determine whether an executor or administrator of such estate should or should not be removed for failure to make and return an inventory of the estate within the time limited therefor.[11]

It is the duty of the executor of a decedent to include in the

6. Phelan v. Smith, 100 Cal. 159.
7. Estate of Lux, 100 Cal. 593.
8. Baum v. Reay, 96 Cal. 462.
9. Wheeler v. Bolton. 92 Cal. 159.
10. Anthony v. Chapman, 65 Cal. 73; Baker v. Brickell, 87 Cal. 329.
11. In re Garber, 11 Cal. 432.

inventory of the estate of such decedent the amount of money owing to the decedent at the time of his death by such executor as so much money in his hands when the debt or demand becomes due, and the sureties on the bond of such executor are liable therefor.[12]

Title to the estate of a decedent by an executor or administrator is under the code system not, strictly speaking, the legal title to even the personal property of a decedent, but under that system a special property in the estate of the decedent vests in such executor or administrator charged with a trust not only to apply the property to the payment of claims presented, but to do such acts in carrying out contracts of the deceased as the law imposes upon him the obligation of performing.[13]

An administrator who is a party to an action involving the title of the intestate to real estate, represents the title which the deceased had thereto at the time of his death, and in the absence of fraud, if the final judgment in the action is against the validity of such title, such judgment is conclusive against the heirs of such intestate.[14]

During the administration and until distribution, or an order of the court for delivery of the property of a decedent to his heirs, the executor or administrator is entitled to the possession of such property;[15] and the executor or administrator would be entitled to recover the possession of such property from the heirs or devisees of such decedent.[16] The right of the executor or administrator to such property extends by relation back to the time of the death of the deceased.[17]

Prior to the first day of January, 1873, when the present code of California went into effect, the heir of a decedent could not during the pendency of an administration on the estate of such decedent maintain ejectment to recover the possession of real estate owned by the decedent at the time of his death nor to quiet title to the same.[18]

12. Treweek v. Howard, 105 Cal. 434.
13. Janin v. Browne, 59 Cal. 37.
14. Cunningham v. Ashley, 45 Cal. 485.
15. Code of Civil Procedure, Secs. 1452, 1453.
16. Page v. Tucker, 54 Cal. 121.
17. Jahns v. Nolting, 29 Cal. 507.
18. Meeks v. Kirby, 47 Cal. 168; Stark v. Fox, 53 Cal. 655; Crosby v. Dowd, 61 Cal. 557.

Prior to the time these codes went into effect such actions could not be maintained by the heir so long as the right to the possession of such real estate of the decedent was in his executor or administrator. By provisions of section 1452 of the Code of Civil Procedure, an heir or devisee of a decedent could himself or jointly with the executor or administrator maintain an action for the possession of real estate of the decedent, or for the purpose of quieting title to the same against any one except the executor or administrator.[19]

The court having jurisdiction of the estate of a decedent, unless it satisfactorily appear to the court that the rents, issues and profits of the real estate of such decedent are necessary to be received by his executor or administrator for a longer period, wherewith to pay his debts, or that it will probably be necessary to sell such real estate for the payment of such debts, must, at the end of the time limited for the presentation of claims against the estate of the decedent, direct such executor or administrator to deliver the possession of all such real estate to the heirs at law or the devisees of the decedent.[20]

The heir of a decedent has the right of entry upon the *real* estate left by his ancestor subject only to the claim of the administrator, when there is one, and when there is no administrator, the heir can maintain ejectment for the possession of such real estate.[21]

Upon the death of the ancestor, his heir is vested at once with the full title to the estate of the ancestor, subject to the statutory claim of the administrator thereto and the legislature has no right by a special act to order a sale of this vested interest.[22]

The direction in the will of a decedent that his executor should, as soon as practicable in the judgment of the executor, convert all of his property not personal and mixed, into money, does not divest the heir of the decedent of his interest in real estate, until the same has been converted into money as directed by the will.[23]

19. Tryon v. Hunter, 67 Cal. 325.
20. Code of Civil Procedure, Sec. 1453.
21. Updegraff v. Trask, 18 Cal. 458.
22. Brenham v. Story, 39 Cal. 179.
23. Estep v. Armstrong, 91 Cal. 659.

CHAPTER L.

OF OTHER DUTIES AND OF THE POWERS OF AN EXECUTOR AND ADMINISTRATOR.

It is an administrator's duty to act with fidelity, and with that degree of prudence and diligence which a man of ordinary judgment would be expected to bestow upon his own affairs of a like nature.[1]

An executor or administrator acts as trustee and agent for the owners of the property administered on whether heirs or assignees of heirs, or legatees, and his attorney stands in the same confidential relation.[2]

An executor or administrator is answerable in his accounts for the uncollected debts due the decedent as appraised in the inventory, unless it appear to the court that the failure to collect the debt was not the result of his negligence.[3]

An executor or administrator who is guilty of great delay in accounting, is chargeable in his account with legal interest on balances, with annual rests.[4]

When an heir or devisee of a decedent sues the executor or administrator for damages alleged to have been caused by the negligence of such executor or administrator in not taking and retaining possession of property belonging to the estate, the burden is on the plaintiff in the action to establish such negligence, and the damages resulting therefrom, by competent proof.[5]

An executor or administrator is properly accountable in his account with the value of real estate lost to the estate through

1. Estate of Moore, 96 Cal. 522.
2. Bergin v. Haight, 99 Cal. 52.
3. Estate of Sanderson, 74 Cal. 199.
4. Estate of Sanderson, 74 Cal. 199.
5. Estate of Bolton, 92 Cal. 159.

the negligence of the executor or administrator to pay the taxes thereon.[6]

An executor or administrator is prima facie liable for only the assets of the estate of a decedent which came into his possession.[7]

The personal obligation of an executor or administrator for a devastavit is only enforcible by resort to the court which settled his account.[8]

The administrator of a decedent against whom, in his lifetime, judgment was rendered for the possession of real estate, and who (said decedent) appealed from the judgment, and gave an undertaking on the appeal staying execution, is not liable for the rents of such real estate collected by the administrator pending the appeal, and which were used by him as administrator of the estate of such decedent.[9]

When an executor or administrator occupies and uses the real estate of his decedent, he must account for the rental value of the land so used, and for all profits, if any, which he makes from such occupation and use; he must in any event, account for the rental value of the land so used, and if he sustains a loss from such use, the loss is his own.[10]

It is the duty of a domiciliary executor to exercise reasonable diligence to gather in and account for foreign assets of his testator.[11]

If foreign assets of an estate come into the possession of an executor in a foreign country by a voluntary payment, he is bound to account for them in the domiciliary jurisdiction.[12]

If the executor in the reasonable exercise of his best judgment employs an agent abroad to receive the assets of the estate in a foreign country and forward them to him, he is not chargeable in his account with such assets, if lost without his fault or negligence.[13]

An executor or administrator has no authority to intermeddle with the partnership affairs of the decedent and his sur-

6. Estate of Herteman, 73 Cal. 545.
7. Wheeler v. Bolton, 92 Cal. 159.
8. Washington v. Block, 83 Cal. 290.
9. Sheppard v. Tyler, 92 Cal. 552.
10. Walls v. Walker, 37 Cal. 424.
11. In re Ortiz, 86 Cal. 306.
12. Fox v. Fay, 89 Cal. 339.
13. Estate of Taylor, 52 Cal. 477.

viving partner, except for the purpose of having the surviving partner close up the affairs of the partnership and account to him.[14]

When an executor or administrator carries on the business of the deceased, after the death of the decedent, he does so at his own risk.[15]

An administrator who deposits the money of an estate in *his own name* in a bank of deposit, is chargeable in his account with the money so deposited when lost to the estate from a subsequent insolvency of the bank, although he used reasonable care and prudence and diligence in respect to making such deposit, and although such bank was, at the time of making the deposit, in good standing and credit.[16]

When a contract of the deceased is of an executory nature, and his personal representative can fairly and sufficiently do all the deceased could have done, he may do so, and enforce the contract, and he is bound to complete the contract, and if he does not, he may be made to pay damages out of the estate.[17]

An agreement made by an executor or administrator which is not authorized by law is void.[18]

An executor or administrator has the authority, with the approval of the probate court, to compromise an action for damages.[19]

Executors and administrators have the legal right to compound and discharge debts due to their testator or intestate; and if in so doing they act fairly and in good faith with due regard to the interests of the estate, their acts are valid and binding.[20]

But an agreement of an administrator to receive a note of a judgment debtor of the decedent, for a sum less than the amount of the judgment, in satisfaction of the judgment, is void.[21]

A mortgage of the property of a decedent made pursuant

14. Tompkins v. Weeks, 26 Cal. 50.
15. Estate of Rose, 80 Cal. 166.
16. Estate of Arguello, 97 Cal. 196.
17. McCann v. Pennie, 100 Cal. 547.
18. Danielwitz v. Sheppard, 62 Cal. 339; Jones v. Hanna, 81 Cal. 507; Estate of Page, 57 Cal. 238.
19. Hartigan v. Southern P. Co., 86 Cal. 142.
20. Moulton v. Holmes, 57 Cal. 335.
21. Siddal v. Clark, 89 Cal. 321.

to the provisions of the statute and of the order of the probate court authorizing such mortgage to be made is valid.[22]

The administrator of the estate of a decedent has authority to lease the real property of the estate during the period of the administration for a term definite, subject to be terminated by final distribution of the estate and the discharge of the administrator.[23]

By statute a lease of the real estate of a decedent for a term not exceeding five years, if made pursuant to the provisions of such statute and the orders of the probate court, is valid.[24]

It is the duty of an executor or administrator to take care of, manage and preserve an estate committed to him; but, if he pay money not due by the intestate, to relieve the estate from a mortgage upon such estate, this money is paid at his own risk.[25]

An executor or administrator has no right to bind heirs or devisees by consenting to the laying out and opening of a public highway across the lands of the estate of a decedent.[26]

An executor cannot litigate the claim of one legatee as against another legatee at the expense of the estate.[27]

After a will has been admitted to probate an executor who has received letters testamentary on such estate, has the right, and it is his duty, to defend in a proceeding to revoke the probate of such will;[28] and if he incurs expense in such litigation, such expenses should be allowed him in his account as executor.[29]

The estate of an intestate should not bear the expenses of the losing party in a contest for letters of administration on the estate.[30]

An administrator of the estate of a decedent, when subsequently a document is offered for, and admitted to probate as

22. Thomas v. Parker, 97 Cal. 456.
23. Doolan v. McCauley, 66 Cal. 476.
24. Code of Civil Procedure, Sec. 1579.
25. Estate of Knight, 12 Cal. 200; Tompkins v. Weeks, 26 Cal. 50.
26. Rush v. McDermott, 50 Cal. 471.
27. Estate of Murrey, 65 Cal. 287; Estate of Jessup, 80 Cal. 625.
28. Estate of Whetton, 98 Cal. 203.
29. Abila v. Burnett, 33 Cal. 658.
30. Estate of Barton, 55 Cal. 87.

the will of such decedent is not entitled to be allowed in his account for any of his costs and expenses incurred in resisting the probate of such will.[31]

A probate court has no jurisdiction to award costs and expenses to be paid out of the estate of a decedent to a proponent or contestant of a document purporting to be the last will of a decedent, until the document be admitted to probate as such will, or the probate of the document as such will be denied.[32]

If a person who is the administrator of the estate of a decedent purchases from and has conveyed to him by an heir of the decedent by reason of, and through representations which are false in fact, the interest of such heir in the estate which such purchaser holds under such purchase and which was conveyed to him by the heirs is held in trust for the heir.[33]

If an administrator or executor purchase at a probate sale made by him, through another person, who is the apparent purchaser, any portion of the estate of a decedent, he will hold the portion of the estate so purchased as a trustee for the heirs or devisees of the decedent or their assignee.[34]

But after the administration of an estate is closed, the person who was the administrator, has the right to purchase real estate which has been sold by him as administrator under a probate sale of such real estate, provided there was no agreement before the administration was closed as to such purchase.[35]

It is the duty of an executor or administrator immediately after his appointment to cause to be published in some newspaper of the county in which the appointment was made, if there be one, or if not, then in such newspaper as may be designated by the court, a notice to the creditors of the decedent requiring all persons having claims against the estate of the decedent to exhibit them with the necessary vouchers to the executor or administrator, at the place of his residence or business, to be specified in the notice; such notice must be published as often as the court or judge shall direct, but not less than

31. Estate of Parsons, 65 Cal. 240.
32. Henry v. Superior Court, 93 Cal. 569.
33. Wingerter v. Wingerter, 71 Cal. 105.
34. Scott v. Umbarger, 41 Cal. 410; Boyd v. Blankman, 29 Cal. 19. Guerrero v. Ballerino, 48 Cal. 118; O'Connor v. Flynn, 57 Cal. 293; De Celis v. Porter, 59 Cal. 464.
35. Burris v. Adams, 96 Cal. 664.

once a week for four weeks; and the court or judge may also direct additional notice by publication or posting; the time expressed in the notice must be ten months after the first publication when the estate exceeds in value the sum of ten thousand dollars, and four months when it does not.[36]

Evidence of the publication of the notice may be given by the affidavit of the printer of the newspaper, or of his foreman or principal clerk annexed to a copy of the notice, specifying the times when, and the paper in which the publication was made.[37]

An executor or administrator has the right to have the actual custody of the assets of the estate of the decedent.[38]

An executor or administrator has no authority to sell promissory notes belonging to a decedent except under an order of the probate court.[39]

An executor or administrator cannot waive the bar of the statute of limitations to a claim against the estate of a decedent.[40]

An executor or administrator has no right to receive as such, the proceeds of a policy of insurance payable to the widow and children of a decedent; the proceeds of such policy are not a part of the estate of the decedent.[41]

An executor or administrator must collect all debts due the estate, and is answerable for any debts remaining uncollected through his fault.[42]

An executor or administrator must take into his possession all of the estate of the decedent, real and personal; and an action for the recovery of any property, real or personal, or for the possession thereof or to quiet title thereto, or to determine any adverse claim thereon, and all actions founded on contracts may be maintained by and against executors or administrators in all cases in which the same might have been maintained by or against their respective testators or intestates; and executors

36. Code of Civil Procedure, Secs. 1490 and 1491.
37. Code of Civil Procedure, Sec. 2010.
38. Estate of Welsh, 110 Cal. 605.
39. Wickersham v. Johnson, 104 Cal. 407.
40. Boyce v. Fiske, 110 Cal. 107.
41. Heydenfeldt v. Jacobs, 107 Cal. 373.
42. Maddock v. Russell, 109 Cal. 417.

and administrators may maintain actions against any person who has wasted, destroyed, taken or carried away or converted to his own use, the goods of their testator or intestate in his lifetime; they may also maintain actions for trespass committed on the real estate of the decedent in his lifetime; and any person or his personal representatives may maintain an action against the executor or administrator of any testator or intestate who in his lifetime has wasted or destroyed, taken or carried away or converted to his own use, the goods or chattels of such person, or committed any trespass on the real estate of such person.[43]

An executor or administrator has a special property in the personality of the estate of his testator or intestate, and he can bring an action in his own name to recover its value when converted to his own use by another person subsequent to the death of his testator or intestate.[44]

When the personal property of a decedent is in the possession of an administrator of his estate, and while in such possession is converted by a wrong-doer to his own use, the administrator can maintain an action in his own name against the wrong-doer for such conversion.[45]

The general rule that the administrator or executor must take into his possession all of the estate of the decedent, real and personal, and collect all debts due to the decedent, or to the estate, does not include the partnership property of the decedent owned at the time of his death by him and another person or persons as their partnership property; nor does it include any debts due to such partnership.

The surviving partner or partners have the right to continue in possession of the partnership property, and to settle its business; but the interest of the decedent in the partnership must be included in the inventory filed and must be appraised as other property.

Upon the application of the executor or administrator, the court, or a judge thereof may, whenever it appears necessary, order and compel the surviving partner to render an account.[46]

43. Code of Civil Procedure, Sec. 1581, 1584.
44. Ham, admr. v. Henderson, 50 Cal. 367; Jahns v. Nolting, 29 Cal. 507.
45. Munch v. Williamson, 24 Cal. 167.
46. Code of Civil Procedure, Sec. 1585.

Whenever a debtor of a decedent is unable to pay all of his debts, the executor or administrator, may with the approval of the court or a judge thereof, compound with him and give him a discharge upon receiving a fair and just dividend of his effects, and a compromise may also be authorized when it appears to be just, and for the best interests of the estate.[47]

When there is a deficiency of assets of the estate of a decedent in the hands of an executor or administrator, and such decedent in his life time has made conveyances of his property, and such conveyances were in fraud of his creditors, the executor or administrator, must on the application of the creditors of the decedent, and on their payment, or securing the payment of the costs and expenses of the action, commence and prosecute to final judgment any proper action for the recovery of such property.[48]

A foreign administrator of the estate of a decedent who as such administrator sues and recovers judgment against a person in the state or county in which his letters of administration were issued, cannot, as such administrator, maintain in another state, an action on such judgment against the judgment debtor, but can maintain such action in another state in his individual name.[49]

47. Code of Civil Procedure, Sec. 1588.
48. Code of Civil Procedure, Sec. 1589 and 1590.
49. Lewis v. Adams, 70 Cal. 403.

CHAPTER LI.

OF PLEADINGS AND JUDGMENTS IN ACTIONS BY OR AGAINST AN EXECUTOR OR AN ADMINISTRATOR.

The complaint in an action by an executor or administrator must contain allegations showing that he is entitled to sue in that capacity.[1]

In an action by an executor the complaint should show the death of his testate, leaving a last will, and his being named therein as executor, the probate of such will, and the issuance of letters testamentary thereon to the plaintiff, and his qualification and entry upon the discharge of his duties as such executor, and that he has been ever since the executor of such will.[2]

An administrator must allege matters to show his right to sue as such administrator; although it is necessary that an executor or administrator who sues in a representative capacity should allege matters showing his appointment and right to sue, in actions against executors or administrators it is not necessary to allege in the complaint facts showing how the defendant became invested with his representative capacity, but it is sufficient if the complaint show the death of the decedent, and that the defendant is an executor or administrator of the decedent's estate.[3]

A judgment against an executor or administrator should not, as a general rule, be a personal judgment, but the judgment should be made payable in the due course of administration.[4]

Costs may be taxed against an executor or administrator

1. Barfield v. Price, 40 Cal. 536; Judah v. Fredericks, 57 Cal. 389; Halleck v. Mixer, 16 Cal. 574.
2. Halleck v. Mixer, 16 Cal. 575; Kirsch v. Derby, 96 Cal. 602.
3. Wise v. Williams, 72 Cal. 547.
4. Atherton v. Fowler, 46 Cal. 323.

on a judgment against such executor or administrator when the prevailing party in such action is entitled to costs in the action, and the judgment in the action for costs may be against such executor or administrator, personally; but he may be allowed for such costs in his account in the probate court unless that court otherwise directs.[5]

5. Reay v. Butler, 99 Cal. 477.

CHAPTER LII.

OF PROVISIONS FOR THE SUPPORT OF THE FAMILY OF A DECEDENT, AND OF THE HOMESTEAD.

Until an inventory of the estate of a decedent be returned, the family of the decedent, if consisting of his widow and his minor children, or of either or any of them, is entitled to remain in possession of the homestead, of the wearing apparel of the family, the household furniture of the decedent, and is entitled to a reasonable provision for the support of such family, to be allowed by the court or a judge thereof.[1]

Upon the return of such inventory, or at any subsequent time during the administration, the court may, on its own motion, or on a petition, set apart for the use of the surviving husband or wife, and in case of his or her death, for the use of the minor children of the decedent, all the personal property of the decedent exempt from execution, and if the decedent left a widow or surviving husband and left no minor child or children, the property set apart will be the property of the widow or surviving husband; but if the decedent left also a minor child or children, one-half of this property shall be the property of the widow or surviving husband, and the other half thereof shall be the property of the minor child, or in equal shares, the property of the minor children if there be more than one; if there be no surviving husband or wife, the whole of this property will belong to the minor child or children; if, upon the return of the inventory it shall appear therefrom that the value of the whole estate does not exceed the sum of fifteen hundred dollars, and there be a widow or minor children of the deceased, the court or a judge thereof, must make an order requiring all persons interested to appear on a day fixed to show cause why the

1. Code of Civil Procedure, Sec. 1464.

whole of said estate should not be assigned for the use and support of the family of the deceased.

Notice thereof shall be given and proceedings had in the same manner as is provided in sections 1633, 1635 and 1638 of the Code of Civil Procedure.

If, upon the hearing, after it has been proved to the satisfaction of the court that such notice was given and the court finds that the value of the estate does not exceed the sum of fifteen hundred dollars, the court, by decree, which should show that proof had been made to the satisfaction of the court that such notice had been given, should assign to the widow of the deceased, if there be a widow, if no widow, then to the minor child or children of the deceased, if there be a minor child or children, the whole of the estate of the deceased, subject to whatever mortgages, liens or incumbrances there were upon the estate at the time of the death of the deceased, and after the payment of the expenses of the last illness of the deceased, funeral charges and expenses of administration.[2]

If the widow has a maintenance derived from her own property equal to the portion set apart to her under the sections providing for the support of the family, the whole property so set apart, other than the homestead, must go to the minor children.

Upon the return of an inventory of an estate of a decedent, or at any time thereafter, the court must set apart as a homestead, as hereinafter stated, to the surviving husband or wife, the homestead of the decedent which has been selected, designated and recorded, provided it was selected and recorded from the common property, or from the separate property of the person selecting or joining in the selection of the same.

If no such homestead has been selected, designated and recorded, or in case such homestead was selected, designated and recorded by the survivor, out of the separate property of the deceased, who did not join in such selection, the court must select, designate and set apart, and cause to be recorded a homestead, out of the common property, or, if there be no common property, then out of the real estate belonging to the deceased,

2. Estate of Palomares, 63 Cal. 402; Code of Civil Procedure, Secs. 1465, 1468, 1469.

for the use of the surviving husband or wife and the minor children, if any; or if there be no surviving husband or wife, then for the use of the minor children of the decedent, if any.[3]

The homestead so selected by the court is designated as a probate homestead. Community real estate duly dedicated and selected as a homestead, by either the husband or wife, upon the death of one of the spouses, becomes the sole property of the survivor, and is protected as to such survivor in the same manner as before it had been protected to the spouses, by its homestead character.[4]

If the homestead selected by the husband and wife, or either of them, during their coverture and recorded while both were living, was selected from the community property, or from the separate property of the person selecting or joining in the selection of the same, it vests, on the death of the husband or wife, absolutely in the survivor.[5]

The law in force at the time of the death of a husband or wife controls on the subject of homesteads, and the rights of the survivor.[6]

The legislature has provided for the appraisement in the inventory of the value of the homestead of a decedent which was selected and recorded prior to his death, and if the homestead was such that the title of the homestead would vest absolutely in the survivor, then if the appraised value of such homestead, at the time it was so selected, exceeded five thousand dollars, or if the homestead was appraised as provided in the Civil Code and such value exceeded that sum, then, in either of such cases, the legislature has made provisions for the segregation of, and setting apart, to the survivor, out of that homestead, a homestead of the value of five thousand dollars, and that if such segregation of, and setting apart of such homestead of the value of five thousand dollars could not be made without material injury, then, that the homestead be sold and the proceeds be distributed to the parties entitled thereto.[7]

If the value of such homestead exceeded at the time of the

3. Code of Civil Procedure, Sec. 1465.
4. Saunders v. Russell, 86 Cal. 119; Tyrrell v. Baldwin, 78 Cal. 470.
5. Estate of Croghan, 92 Cal. 371.
6. Tyrrell v. Baldwin, 78 Cal. 470.
7. Code of Civil Procedure, Secs. 1475, 1476.

decedent's death, five thousand dollars, but its value at the time of the selection of the homestead was five thousand dollars, or less, and if the homestead had not been appraised as provided in the Civil Code, or if so appraised, its then appraised value was five thousand dollars, or less, then, as between the widow and heirs of the decedent, the title to the homestead vests absolutely in the widow, although the value of the homestead at the time of the death of the decedent exceeded five thousand dollars.[8]

If the homestead be so selected and recorded, that the title thereto would in case of the death of one of the spouses vest absolutely in the survivor, and there are subsisting liens or incumbrances on the homestead at the time of the death of the husband, the claims secured thereby must be presented and allowed as other claims against the estate, and if the funds of the estate be adequate to pay all claims against the estate, the claims so secured must be paid out of such funds, but if the funds of the estate be not sufficient for that purpose, the claims so secured shall be paid proportionally with the other claims allowed, and the liens or incumbrances on the homestead shall only be enforced against the homestead for any deficiency remaining after such payment.[9]

If the probate homestead be by the order of the court selected from the separate estate of either a deceased husband or wife, it can only be set apart for a limited period, and it vests on the death of the person from whose estate it was selected in his or her heirs, subject to the order of the court setting it apart for a limited period to the family of the deceased.[10]

The homestead after it is set apart absolutely by the court ceases to be a part of the estate of the decedent.[11]

If the homestead be assigned for only a limited period to the family of the decedent, the title to the homestead property vests in the heirs of the decedent subject to such assignment for a limited period; the portion of the estate which so vests in the heirs like other property which passes to the heirs of a decedent under the provisions of section 1384 of the Civil Code is, or

8. Estate of Burdick, 76 Cal. 639; Estate of Walkerly, 81 Cal. 583.
9. Code of Civil Procedure, Sec. 1475.
10. Code of Civil Procedure, Sec. 1474, 1468.
11. Schadt v. Heppe, 45 Cal. 433.

should be, subject to the control of the probate court for the payment of the debts of the decedent.

A probate homestead is exempt from execution except to enforce liens and incumbrances legally thereon prior to the death of the decedent or legally thereon subsequent to his death. A deficiency judgment in an action to foreclose a mortgage on other land, foreclosed and sold subsequent to the death of the husband is not a lien on such homestead.[12]

The widow of a decedent who marries again before a probate homestead is set apart to her by the court loses by such marriage her right to a probate homestead.[13]

The right to a probate homestead is not any interest in land, and the right of a widow of a decedent to a probate homestead is not defeated by a conveyance by her of all of her interest in the real estate left by her husband.[14]

A probate homestead cannot be set apart by the court except it be of real estate which could have been selected as a homestead during the continuance of the marriage under the provisions of the Civil Code.[15]

A probate homestead set apart by the court, as between the widow and heirs at law, may exceed in value the sum of five thousand dollars.[16]

When the probate homestead is selected from the community property of a decedent and a surviving husband or wife, it may be set apart absolutely, and need not be set apart for a limited period;[17] and since the code does not point out the steps to be pursued in setting apart a probate homestead the court may adopt any suitable method of procedure conformable to the spirit of the code.[18]

When a probate homestead is set apart out of community property of the decedent and a surviving wife for the use of the family of the decedent which consisted of his wife and nine of his minor children, such property cannot be partitioned

12. Keyes v. Cyrus, 100 Cal. 322.
13. Estate of Boland, 43 Cal. 640.
14. Estate of Vance, 100 Cal. 425; Estate of Moore, 57 Cal. 437.
15. Estate of Noah, 73 Cal. 590; Estate of Armstrong, 80 Cal. 71; Estate of Carriger, 107 Cal. 618.
16. Estate of Walkerly, 81 Cal. 579; Estate of Smith, 99 Cal. 449.
17. Phelan v. Smith, 100 Cal. 159.
18. Phelan v. Smith, 100 Cal. 159.

before the youngest of the minor children, who lives, attains majority.[19]

The word heirs mentioned in section 1468 of the Code of Civil Procedure cannot be construed to mean "devisees," and when a probate homestead is set apart for a limited period out of the separate property of the decedent who dies testate, the title to such property vests in the heirs of the decedent, subject to the order of the court setting it apart as a homestead.[20]

If the amount set apart by the court for the use of the widow and minor children of a decedent, or either, be insufficient for their support, the court or a judge thereof must make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family, according to their circumstances, during the progress of the settlement of the estate, which in case of an insolvent estate must not be longer than one year after granting letters testamentary or of administration; and this allowance must be paid in preference to all other charges, except funeral charges and expenses of administration; and the court in its discretion may make such allowance take effect from the death of the decedent.[21]

This family allowance should be made regardless of the widow's financial ability to support herself without aid from the estate; and in making the family allowance regard should be had to the mode in which the widow had lived during the life time of her husband.[22]

19. Fountain v. Hoppe, 104 Cal. 94.
20. Estate of Walkerly, 108 Cal. 627.
21. Code of Civil Procedure, Secs. 1466, 1467; Estate of Welsh, 106 Cal. 427.
22. Estate of Lux, 100 Cal. 594.

CHAPTER LIII.

OF CLAIMS AGAINST THE ESTATE OF A DECEDENT.

The Code of Civil Procedure, sections 1493-1513, prescribes the time in which claims against the estate of a decedent are to be presented for allowance and approval.

The code also prescribes in such sections, what the claims so presented must show; how they are to be verified; the time within which an action is to be commenced on rejected claims; the effect of a judgment thereon if in favor of a claimant; the referring of claims concerning which there is a doubt in regard to their correctness, and the payment of interest bearing debts of a decedent, if by order of the court, although such debt be not due.

The order of the court for the publication of notice to creditors of a decedent to present their claims need not specify the number of times the notice shall be published.[1]

When proof is made to the court of a publication of notice to creditors to present their claims, the court can determine that such publication did not give notice to creditors; and the court may then direct a new notice to be given, as though there had been no previous attempt to give notice to creditors; and the time for the presentation of claims would begin to run only from the giving of the new notice; but if the court recognizes the publication already made as giving notice, the court cannot after the expiration of the term allowed for the presentation of claims extend the time for the presenting of claims by creditors, by ordering additional notice.[2]

The allegation of facts in a complaint against an executor or administrator on a claim against the estate of a decedent,

1. Hensley v. Superior Court, 111 Cal. 541.
2. Johnston v. Superior Court, 105 Cal. 669.

should conform to the statement of the claim as presented for allowance.[3]

Mortgage debts, which are not debts of a decedent are not required to be presented against the estate of a decedent, although he was at the time of his death the owner of the mortgaged real estate, and there need not be in the complaint for foreclosure any express waiver against the general estate of the decedent.[4]

In an action against an executor or administrator on a rejected claim, the plaintiff can only recover on the claim which was presented and rejected.[5]

If the value of the estate of the decedent, in fact exceed ten thousand dollars, then, although the appraised value be less than ten thousand dollars, a claim against the estate of a decedent may be presented for allowance at any time within ten months after the first publication of notice to creditors, unless there had been made and entered a decree of due publication of notice to creditors, or there had been an adjudication by the probate court of the value of the estate, although there was a publication of notice requiring creditors to present their claims within four months after the first publication of such notice.[6]

When a decedent at the time of his death held property as trustee for another person, and this trust property, or its product in a new form, comes into the possession of the executor or administrator of the decedent, an action can be maintained against the executor or administrator to enforce the trust without any presentation of a claim against the estate of the decedent; but if a claim to property so held should be presented to the executor or administrator, it should be for property under a trust accounting.[7]

A surviving partner, or a former partner of a decedent, cannot maintain an action on a claim against an executor or administrator of the decedent, without first presenting the claim for allowance.[8]

3. McGrath v. Carroll, 110 Cal. 79.
4. Ryan v. Holliday, 110 Cal. 335.
5. Lichtenberg v. McGlynn, 105 Cal. 45.
6. Peterson v. Smith, 111 Cal. 457.
7. McGrath v. Carroll, 110 Cal. 79; Gunter v. Jones, 9 Cal. 644; Lathrop v. Bampton, 31 Cal. 22.
8. Falkner v. Hendy, 107 Cal. 49.

A mortgage debt upon the homestead of a decedent selected and recorded in his lifetime, and which homestead existed at the time of his death must be presented as a claim against the estate;[9] but other mortgage debts of a decedent need not be presented for allowance if the holder of such mortgage debt in his complaint of foreclosure and for the sale of the mortgaged property for the payment of the moregage debt expressly waives all recourse against any other property of the decedent.[10]

A contingent liability of a person in his life time on a contract of indemnity and existing at the time of his death must be presented as a claim to the executor or administrator of his estate.[11]

When money claims against the estate of a decedent are allowed by the administrator or executor of his estate, and have thereafter been assigned to a creditor of the deceased, the assignee can maintain an action to set aside a fraudulent conveyance of property made by the decedent to the person who is such executor or administrator, and to have the property so conveyed, or so much thereof as is necessary, applied to payment of the debts of the decedent.[12]

A claim against an estate when allowed has the power and effect of a judgment payable in the due course of the administration of the estate; and a person who has made a sale of property, the title to which was not to pass until the agreed purchase price was paid, and who has presented a claim for the unpaid portion of the agreed purchase price, and this claim is allowed, is thereby, in the absence of false representations as to the condition of the estate, estopped from asserting ownership of the property so sold.[13]

An action cannot be maintained against the executor or administrator of a decedent who was a guarantor for a lessee for the performance of the covenants of a lease, on a claim presented to and allowed by such executor or administrator for rents due and to become due by the terms of the lease; nor for

9. Code of Civil Procedure, Sec. 1475; McGahey v. Forrest, 109 Cal. 63.
10. Code of Civil Procedure, Sec. 1500; McGahey v. Forrest, 109 Cal. 63; Bank of Suisun v. Stark, 106 Cal. 202.
11. Maddock v. Russell, 109 Cal. 417.
12. Emmons v. Barton, 109 Cal. 662.
13. Holt Mfg. Co. v. Ewing, 109 Cal. 353.

damages by reason of a breach by the lessee of some of the covenants of the lease unless a claim for such damages was presented to such executor or administrator; nor for damages which might arise thereafter from a breach of the covenants of the lease by the lessee, until after such damages had arisen, by the breach by the lessee of said covenants, although a claim for contingent damages was presented to the executor or administrator and was rejected.[14]

An action on a claim for damages which are contingent, and which claim is due when presented, and the claim is rejected, must be brought within three months after the rejection of the claim, but, if it is not due when presented, and is rejected, such action must be brought within two months after it is due.[15]

When there are two or more administrators of an estate the allowance of a claim against the estate by one of them is the act of all.[16]

When the claim is allowed and approved and is thereafter contested by heirs or creditors the burden is on them of showing that the allowance and approval of the claim was not justified by the facts.[17]

When a claim against the estate of a decedent is allowed in part and filed, the claimant can maintain an action against the executor or administrator on the part of the claim which was not allowed.[18]

An allowance by the judge of a claim against the estate of a deceased person made on an ex parte application may subsequently be set aside by him without notice to the claimant.[19]

There can be no allowance or rejection of a claim by the attorney of an executor or administrator; but the executor or administrator is bound by the acts of his attorney in delivering or refusing to deliver to the claimant the claim which has been presented for allowance, and in refusing to allow the claimant an inspection thereof, after it was so presented.[20]

14. Fratt v. Hunt, 108 Cal. 288.
15. Code of Civil Procedure, Sec. 1498.
16. Willis v. Farley, 24 Cal. 490.
17. Estate of Swain, 67 Cal. 642; Estate of Loshe, 62 Cal. 413.
18. Walkerly v. Bacon, 85 Cal. 137.
19. Estate of Sullenberger, 72 Cal. 549.
20. Cowgill v. Dinwiddie, 98 Cal. 481.

It is the duty of an executor or administrator on demand to return a rejected claim, with his official action indorsed thereon, to the claimant, and if he refuses to do so or to inform the claimant of his action thereon a secret endorsement on the claim of its rejection would be probably inoperative as a rejection of the claim.[21]

The failure of an executor or administrator to act on a claim for more than ten days, after it is presented to him for allowance, gives the claimant, at his option, the right to consider the claim as rejected.[22]

A pledgee is not obliged to present his claim for the debt secured by the pledge to the executor or administrator of the pledgor, unless he seeks recourse against other property of the estate.[23]

The rule that the owner of a mortgage debt need not present his claim thereon before commencing an action for the foreclosure of the mortgage (except a mortgage debt on a homestead selected and recorded in the lifetime of the decedent), if he in his complaint in the foreclosure action expressly waives all recourse against other property of the estate, applies to the case of an action to foreclose a mortgage pending at the time of the death of the decedent.[24]

In order to present a mortgage as a claim against the estate of a deceased mortgagor, it is necessary, either to accompany the claim with a copy of the mortgage, or to describe it by reference to the date, volume and page of its record.[25]

When a mortgage covers the homestead on the separate property of the wife, and the creditor waives all claims against the husband's estate, the creditor need not present a claim against such estate.[26]

A mortgage given by the husband and wife upon which a homestead is afterwards declared, must, upon the death of the husband, be presented as a claim against his estate.[27]

21. Cowgill v. Dinwiddie, 98 Cal. 481.
22. Roddan v. Doane, 92 Cal. 555; Cowgill v. Dinwiddie, 98 Cal. 481.
23. Estate of Kilbe, 57 Cal. 407; Estate of Galland, 92 Cal. 293; Mechanics' etc. Ass. v. King, 83 Cal. 440.
24. Hibernia S. &. L. Society v. Wackenreuder, 99 Cal. 503.
25. Bank of Sonoma v. Charles, 86 Cal. 322.
26. Bull v. Coe, 77 Cal. 54.
27. Wise v. Williams, 88 Cal. 30.

When a mortgage is given to secure the payment of a note which was not signed by the mortgagor, and the mortgage was given solely for the purpose of securing the payment of the debt of a third person, and the mortgagor thereafter dies, the mortgage is not a claim required to be presented to the executor or administrator of the decedent, and if so presented and allowed, this does not prevent the statute of limitations from running against the action.[28]

When a husband and wife mortgage a homestead selected from community property to secure the payment of notes made by the husband, and the husband subsequently dies, and the holder of the notes and mortgage did not present them as claims against the estate of the husband within the time prescribed by law, such failure released the homestead property from the lien of the mortgage, and was a bar to its subsequent foreclosure; and if after the homestead was so released from the lien of that mortgage, the widow gave her own notes, the amount of which was made up of the original debt of the husband, and a small sum in addition thereto, to the holder of the husband's notes and of that mortgage, and executed a mortgage of said homestead property to such person to secure the payment of said notes given by her, and if she did this in ignorance of the law that such homestead property was so released from the first mortgage given, then such mortgage executed by her, so far as it covered the amount included in the former mortgage of the homestead, was without consideration.[29]

When a mortgage is given by a husband and wife upon their homestead to secure the payment of their joint and several promissory notes, and the husband subsequently dies, and his estate is administered on, and the homestead has been set apart to the wife out of the estate of the husband, and no claim on said mortgage and note was made to the executor or administrator of his estate, no action can be maintained either for the foreclosure of the mortgage or for a personal judgment against the widow on the promissory note.[30]

An action can be maintained to foreclose a mortgage of real

28. Hibernia S. &. L. Society v. Conlin, 67 Cal. 179.
29. Rosenberg v. Ford, 85 Cal. 610.
30. Hearn v. Kennedy, 85 Cal. 55.

estate (not a homestead) given by a person who subsequently dies, and his estate has been administered on and distributed without such mortgage having been presented for allowance, if in the complaint for foreclosure all recourse against any other property of the estate of such decedent is expressly waived.[31]

Such express waiver must be alleged in the complaint in such cases.[32]

When there is such an express waiver in the complaint, the fact that in the prayer of the complaint the appointment of a receiver of the mortgaged property, costs of suit, and attorneys' fees are asked for, does not destroy the effect of the express waiver.[33]

The presentation for allowance of a claim on a note, the payment of which is secured by a mortgage, without a presentation of the mortgage, does not waive the mortgage lien unless there was an intention to waive thereby such lien.[34]

The allowance by an executor or administrator of a mortgage and of the debt to secure which the mortgage was given, as a claim against the estate of the decedent, and its approval by a judge of the court, is not conclusive on the heirs, and such heirs have the right to show that such mortgage, and the debt, were improperly allowed.[35]

A claim on a debt of a decedent secured by mortgage may be presented and allowed, so as to prevent the debt from being barred, and the mortgage from being extinguished by limitation.[36]

The statute of limitations runs against a claim on the expiration of three months from the time of its first rejection, although it was again presented in an amended form, and was again rejected.[37]

A plaintiff to maintain an action on a rejected claim against the estate of a decedent must show a substantial compliance with

31. Dreyfus v. Giles, 79 Cal. 409; German Savings and L. S. v. Fisher, 92 Cal. 502; Anglo-Nevada A. C. v. Nadeau, 90 Cal. 399.
32. Bank of Sonoma county v. Charles, 86 Cal. 322.
33. Hibernia S. &. L. S. v. Wackenreuder, 99 Cal. 503.
34. Bank of Sonoma County v. Charles, 86 Cal. 322.
35. Wise v. Williams, 88 Cal. 30.
36. Moran v. Gardemeyer, 82 Cal. 96; Wise v. Williams, 72 Cal. 544.
37. Gillespie v. Wright, 98 Cal. 169.

the requirements of the statute in respect to the presentation of such claim for allowance.[38]

In a complaint upon a claim against the estate of a deceased person, it is sufficient to aver what the claim is, its non-payment by the deceased, and the death of the deceased, that the defendant is the administrator of the estate of the decedent, that the claim has been properly presented to, and that it was rejected by such administrator.[39]

38. Perkins v. Onyett, 86 Cal. 348.
39. Wise v. Hagan, 77 Cal. 184.

CHAPTER LIV.

OF SALES OF REAL AND PERSONAL PROPERTY BY AN EXECUTOR OR ADMINISTRATOR.

There is no priority in California, except as otherwise provided in the Code of Civil Procedure and Civil Code, between personal and real property of a decedent, for the purposes of sale, for the payment of his debts, the payment of the expenses of the administration of his estate and the family allowance.[1]

In making orders for sales of the property of a decedent, such property, as is not necessary for the support of the family of such decedent, or is not specifically bequeathed, or devised, unless charged in the will of the decedent with the payment of debts, must first be sold.[2]

An order for the sale of perishable personal property, or other property likely to depreciate in value, or which will incur loss or expense by being kept, and so much other personal property as may be necessary to pay the allowance to the family of the decedent, may be made on the petition of the executor or administrator without any previous notice of such application.[3]

Notice of the hearing of an application by an executor or administrator to sell other personal property of the estate of the decedent must be given by posting notices, or advertising for at least five days before such hearing.[4]

Partnership interests, or interests belonging to any estate by virtue of any partnership formerly existing, interests in personal property pledged, and choses in action, may be sold in the

1. Code of Civil Procedure, Sec. 1516.
2. Code of Civil Procedure, Secs. 1516, 1525 and 1544.
3. Code of Civil Procedure, Sec. 1522.
4. Code of Civil Procedure, Sec. 1523.

same manner as other personal property, when it appears to be for the best interest of the estate.[5]

Unless for good reason shown, the court, or a judge thereof, orders a private sale, or shorter notice, the sale of personal property must be made at public auction for such money or currency as the court may direct, and after notice given for at least ten days, by notices posted in three public places in the county, or by publication in a newspaper, or both, containing the time and place of the sale, and a brief description of the property to be sold. Public sales of such property must be made at the court-house door, or at the residence of the deceased, or at some other public place; but no sale shall be made of any personal property which is not present at the sale, unless the court otherwise orders.[6]

Sections 1529-1533 of the Code of Civil Procedure prescribe steps to be taken for the sale of mines, mining interests, and of the shares in mining companies.

In case it becomes necessary in the administration of the estate of a decedent to sell real estate, or the interest therein, which the decedent owned at the time of his death, or the estate has acquired after his death, a verified petition must be presented to the Superior Court, which has jurisdiction of the estate, which petition must set forth the facts required to be set forth therein by the provisions of section 1537 of the Code of Civil Procedure. The attorney who prepares such petition will have no difficulty in preparing it properly, if, at the time, he reads the provisions of that section.

It is provided in an amendment to that section in an act passed by the legislature in 1893, that a failure to set forth facts enumerated in that section will not invalidate the subsequent proceedings if the defect be supplied by proofs at the hearing and the general facts showing that such sale is necessary, or that such sale is for the advantage, benefit, and best interests of the estate and those interested therein, be stated in the decree; but notwithstanding this amendment a careful attorney in order to avoid all questions as to the validity of the title to the real estate sold and conveyed under the proceedings inaugurated by

5. Code of Civil Procedure, Sec. 1524.
6. Code of Civil Procedure, Sec. 1526.

such petition, will always set forth in the petition the matters required to be set forth therein by the provisions of that section, so far as they can be ascertained, and if any of such matters cannot be ascertained, will state that fact in the petition. Prolonged and expensive litigation in California has been caused by a want of care in the preparation of such petitions. The application for the sale of such real property may embrace also an application for the sale of personal property of the decedent.[6a]

Such petition is to be made and verified by the executor or administrator of the decedent; but if such executor or administrator has neglected or refuses to apply for an order for such sale when it is necessary, or when it is for the advantage, benefit and best interest of the estate and those interested therein, that the real estate or some portion thereof be sold, then, any person interested may make application for such sale in the same manner as the executor or administrator, but notice thereof must be given to the executor or administrator, before the hearing; and the decree for the sale, if made in such case, must fix the period of time within which the executor or administrator must make the sale.[7]

When it appears to the court or judge from a verified petition, that the application for the sale of real estate of the decedent should be granted, the petition is to be filed, and an order thereupon made, directing all persons interested in the estate to appear before the court at a time and place specified, not less than four weeks nor more than ten weeks from the time of making such order, to show cause why an order should not be granted to the executor or administrator for the sale of such estate.[8]

A copy of this order must be personally served on all persons interested in the estate, on any general guardian of a minor so interested, and on any legatee or devisee or heir of the decedent, who are residents of the county, at least ten days before the time appointed for the hearing of the petition, or be published four successive weeks in such newspaper in the county as the court or judge shall direct; if all persons interested in the

6a. Code of Civil Procedure, Sec. 1536.
7. Code of Civil Procedure, Sec. 1545.
8. Code of Civil Porcedure, Sec. 1538.

estate join in the petition for the sale, or signify in writing their assent thereto, the notice may be dispensed with, and a hearing may be had at any time.[9]

Since it cannot always be known who all the persons are, who are interested in the estate of the decedent, the only safe way of service on all persons interested in such estate of a decedent, is by a publication of this order to show cause as authorized by the provisions of said section 1539 of the Code of Civil Procedure.

Provisions respecting the postponement of the hearing, the manner in which the hearing is to be had, what the decree of sale should contain, the re-appraisement of the property in case a private sale is ordered, the restriction on a private sale to a sum equal to at least 90 per cent. of the appraised value of the property, the notices of the sale, the manner, place and time of the sale, the return of the sale after it is made, notice of the hearing of such return, the manner of such hearing, the confirmation of such sale, or the ordering of a new sale, the conveyance to be made, and other matters connected with such sale are contained in sections 1544-1558 of the Code of Civil Procedure.

The order of confirmation of such sale must show that it had been proven to the satisfaction of the court that notice was given of the sale as prescribed by statute.[10]

The debts of a testator, the expenses of the administration of his estate and family expenses must be paid so far as the same is sufficient for that purpose, out of the portion of his estate, which is designated in his will for such purpose.[11]

When a testator by his will authorizes his executor to sell property and directs in his will how such sale is to be made, the executor may sell such estate without any order of the court for that purpose; but, in making such sales, the executor must follow the directions of the will as to such sales. The executor must make a return of such sales to the court, but no title passes by such sales until they are confirmed by the court.[12]

The portion of the estate of a testator not specially devised

9. Code of Civil Procedure, Sec. 1539.
10. Code of Civil Procedure, Sec. 1556.
11. Code of Civil Procedure, Sec. 1560.
12. Code of Civil Procedure, Sec. 1561.

or disposed of by his will, except such portions which are devised to pay the debts, expense of administration and family expenses, must first be appropriated and disposed of for such purposes.[13]

But all the estate of a testator, not set apart by the court for the family of the deceased as directed by the Code of Civil Procedure, must be sold to pay the debts of the deceased, the expenses of the administration of his estate, and the family allowance, when a sale thereof is necessary for such purposes; but property of a decedent which has been specifically devised or bequeathed by his will is not to be sold, until other property of the estate of the decedent liable for sale for such purposes has been first sold.[14] And if after the sale of such property, it is necessary to sell for such purposes, a portion of the property of the estate of a decedent, which has been specifically devised or bequeathed, the court must compel a payment to the devisee or legatee of the property so sold by the devisee or legatees of property specifically devised or bequeathed, not sold, of their fair and just proportion of such debts, expenses of administration and family allowance which were paid from the sale of property specifically devised or bequeathed.[15]

The Code of Civil Procedure, sections 1565-1567, has provided for the sale and conveyance of the interest of a decedent in land, for the purchase of which he held a contract at the time of his death; and has also provided for the sale of lands of a decedent, and the application of purchase money from such sale, when such lands are subject to a mortgage or other lien, to the satisfaction of such mortgage or other lien, or of so much of such purchase money as may be necessary for that purpose.[16]

An action cannot be maintained for the recovery of any estate sold by an executor or administrator under the provisions of the Code of Civil Procedure relating to such sales, by any heir or person claiming under the decedent, unless it be commenced within three years next after the settlement of the final account of such executor or administrator; and actions to set aside such sale on the ground of fraud or other grounds upon which the action is based, must be instituted within three years

13. Code of Civil Procedure, Sec. 1563.
14. Code of Civil Procedure, Sec. 1566.
15. Code of Civil Procedure, Sec. 1564.
16. Code of Civil Procedure, Sec. 1570.

after the discovery of such fraud or of such other grounds. Minors or others under legal disability to sue when the right of action first accrued, may, however, commence an action at any time within three years after the removal of the disability.[17]

When a sale has been made by an executor or administrator of any property of a decedent, he must return to the court within thirty days thereafter an account of such sale, verified by his affidavit, or in case of his absence from the county, or other inability, such return may be verified by the affidavit of his attorney.[18]

No executor or administrator must, directly or indirectly, purchase any property of an estate he represents, nor must he be interested in any sale of the property of such estate.[19]

If, upon the hearing of an application for the sale of real estate, it appears to the court that it would be for the interest of the estate that personal property or some part thereof be first sold, the court may, by its decree, so direct.[20]

A proceeding for the sale of real estate by an executor or administrator is a proceeding in rem.

The same presumption attaches to decrees of a Superior Court in probate proceedings upon a collateral attack that attaches to its judgment in cases at common law and equity.

The legislature has prescribed that for the purpose of procuring an order of the Superior Court in probate proceedings for the sale of real estate, that a verified petition shall be filed, notice given and an opportunity for hearing given; these acts are essential to the power on the part of the court to order the sale of real estate, and the petition and notice are jurisdictional.

The petition should state general facts showing that a sale of real estate of the decedent is necessary.

When the court has acquired jurisdiction by the petition and the service of notice, or order to show cause, as prescribed by the code, errors of the court afterwards intervening in the exercise of such jurisdiction, would not, on a collateral attack, render the decree of sale made by the court invalid.

A contract by an administrator of a decedent with a pur-

17. Code of Civil Procedure, Secs. 1573, 1574.
18. Code of Civil Procedure, Sec. 1575.
19. Code of Civil Procedure, Sec. 1576.
20. Code of Civil Procedure, Sec. 1639.

chaser at an administrator's sale made by such administrator before the confirmation of the sale to purchase the real estate from him, is not absolutely void, but it is voidable within a reasonable time, at the election of the heirs or other persons interested in the estate of the decedent.[21]

The court has no jurisdiction nor power to confirm a sale made by an executor or administrator unless such sale was made substantially as directed by the order of the court which authorized such sale to be made.[22]

A sale of real property made by an executor under a power of sale in the will of his testator, must be returned to the court for confirmation, and if, at the hearing on such return a sum exceeding the price obtained by the executor on such sale by at least ten per cent. exclusive of the expenses of a new sale is offered by a responsible person, the court may vacate the sale made and direct a re-sale.[23]

A sale made by the executors of the will of their testator, when there is no power given in the will of the testator to the executors, to make such sale, and when there was no order for such sale made by the court having jurisdiction of the administration of the estate, is void.[24]

The fact that a testator's bequest to charitable uses is in excess of one-third of his estate does not render a power of sale in the will invalid.[25]

A purchaser at a judicial sale which must be confirmed to make it valid, has the right to a conveyance which will vest in him the title to the property purchased, when such sale is of the property itself; a sale, however, by an executor under a power of sale in the will of his testator is not a judicial sale, and the purchaser at such sale, must examine the title to the property for himself, and he may incorporate in his contract of purchase the same terms and conditions which he could have incorporated therein in dealing with any other agent for the sale of the property.[26]

21. Burris v. Kennedy, 108 Cal. 331.
22. Schlicker v. Hemenway, 110 Cal. 579.
23. Estate of Durham, 49 Cal. 490.
24. Huse v. Den, 85 Cal. 390.
25. Estate of Pearson, 98 Cal. 603.
26. Estate of Pearson, 98 Cal. 612.

When a devisee of property is made in the will of a testator, to the executor named in his will as a trustee and in trust to sell and convey for the purposes stated in the will, the person named as such executor, can, as such trustee, sell and convey the property so devised in trust, and without making any return of such sale, and such sale is valid without confirmation by the court.[27]

A special act of the legislature to authorize the administrator to sell and convey the property of his decedent, except for satisfaction of the lien of creditors, for the support of the family, to pay the debts of the deceased or the expenses of the administration of his estate, was and is unconstitutional.[28] Such an act would under the new constitution be special legislation, and consequently, unconstitutional.

An order to show cause why a sale of real estate of a decedent should not be made may be published in a weekly newspaper when directed by the court to be so published; and a notice of such sale may be published in a weekly newspaper, if published therein once a week for two weeks successively next before the sale, and as often during that period as the newspaper is regularly issued.[29]

A probate sale, to satisfy a claim against the estate secured by a mortgage made by a decedent of the property so sold, is not in effect a foreclosure of the mortgage.[30]

Laches will, in some cases, defeat a creditor's petition for the sale of real estate of a decedent.[31]

A person who has a claim against an estate of a decedent for services rendered the estate during the administration, is, when such claim has been allowed by the court, a person interested in the estate within the intent and meaning of section 1545 of the Code of Civil Procedure, as to the persons who can apply for an order for the sale of real estate of the decedent.[32]

The application of an executor or administrator for an order for the sale of the real estate of a decedent is an independent

27. Estate of Williams, 92 Cal. 183.
28. Brenham v. Story, 39 Cal. 179.
29. In re O'Sullivan, 84 Cal. 444..
30. Meyers v. Farquharson, 40 Cal. 190.
31. Estate of Arguello, 85 Cal. 151.
32 Estate of Couts, 87 Cal. 480.

proceeding, and the jurisdiction of the court to make such order depends upon a substantial compliance with the requirements of the probate law.[33]

The decision in Pryor v. Downey, 50 Cal. 388, was made in a case in which the right of the parties had vested before the amendments to section 1537 of the Code of Civil Procedure had been passed by the legislature.

The rule in respect to the requirements of the code in respect to what the petition for the sale of real estate in probate proceedings should show, since the amendment to said section 1537, is authoritatively declared in the case of Burris v. Kennedy, 108 Cal. 331.

When defects in a petition are supplied by the proofs at the hearing and the general facts showing the necessity for the sale are stated in the decree of sale, the order of sale cannot be collaterally attacked.[34]

A petition for the sale of real estate of a decedent must contain a general description of all the property of which the decedent died seized, and an amendment to the petition by adding another parcel of real estate is a new petition, and a new order to show cause should be given.[35]

By the proper publication of an order to show cause why an application to sell real estate of a decedent should not be granted, all persons interested in the order of sale are brought within the jurisdiction of the court.[36]

A motion for a new trial may be made when a decision of the Superior Court is made on issues raised by a petition to sell real estate of a decedent, and by the objection thereto.[37]

A judgment of a probate court ordering a re-sale of property sold by an administrator under an order of sale by the court, for failure of the purchaser at such sale to pay the purchase money, is, where the purchaser had notice of the hearing of a petition for such re-sale, conclusive on such purchaser in a

33. Estate of Boland, 55 Cal. 310; Pryor v. Downey, 50 Cal. 388; Wilson v. Hastings, 66 Cal. 243.
34. Dennis v. Winter, 63 Cal. 16.
35. Gharky v. Werner, 66 Cal. 389.
36. Estate of Couts, 100 Cal. 400.
37. Leach v. Pierce, superior judge, 93 Cal. 624.

collateral action, as to all matters which might have been litigated on the petition for a re-sale.[38]

A probate court has power to compel the execution of a conveyance of land by an administrator in conformity with a sale made under its order, and confirmed by the court.[39]

An action can be maintained by the vender of the heirs of a decedent to quiet title to real estate owned by the decedent at the time of his death, against a person who claims title thereto under a probate sale of such real estate which is voidable by reason of the fraud of such person in procuring such probate sale to be made; and such action is a direct attack on such sale, when such fraud is extrinsic or collateral to the questions determined in the probate court in proceedings in that court.[40]

A substantial compliance with the provisions of law in regard to probate sales is sufficient against collateral attack.[41]

The provisions of section 1573 of the Code of Civil Procedure as to the limitations of actions brought to recover the estate of decedent sold by an executor or administrator, applies to actions by heirs to quiet title to such estate.[42]

38. Brummagim v. Ambrose, 48 Cal. 366.
39. Estate of Lewis, 39 Cal. 306.
40. Bergin v. Haight, 99 Cal. 52.
41. Silverman v. Gundelfinger, 82 Cal. 548; Burris v. Adams, 96 Cal. 664.
42. Richardson v. Butler, 82 Cal. 174.

CHAPTER LV.

OF EXHIBITS AND ACCOUNTS TO BE FILED BY AN EXECUTOR OR ADMINISTRATOR, AND OF PAYMENTS OF DEBTS, AND OF DISTRIBUTION.

Six months after his appointment and at any other time when required so to do by the court, the executor or administrator, must render an exhibit under oath showing the amount of money received and expended by him, the amount of all claims presented against the estate, and the names of the claimants, and all other matters necessary to show the condition of the affairs of the estate; and when an exhibit is rendered by an executor or administrator any person interested may appear, and by objections in writing contest any account or statement therein contained, and the court may examine the executor or administrator, and if he has been guilty of neglect, or has wasted, embezzled or mismanaged the estate, his letters must be revoked.[1]

Within thirty days after the expiration of the time mentioned in the notice to creditors, within which claims must be exhibited every executor or administrator must render a full account and report of his administration. The account rendered must exhibit all debts which have been presented and allowed during the period mentioned in the account; when the authority of an executor or administrator ceases, or is revoked, he may be compelled to appear before the court at the instance of the person succeeding to the administration of the estate and to render an account; in rendering an account the executor or administrator must, except as hereinafter stated, produce and file vouchers for all charges, debts, claims, and expenses, which he has paid; these vouchers must remain in court, or, if any of them be with-

1. Code of Civil Procedure, Secs. 1622, 1627.

drawn when required for other purposes, a certified copy of the vouchers, so withdrawn, must be left on file; if a voucher be lost, or for other good reasons cannot be produced on the settlement, the payment may be proved by the oath of a competent witness. On the settlement of his accounts the executor or administrator may be allowed any item of expenditure not exceeding twenty dollars for which no voucher is produced, if such item be supported by his own uncontradicted oath positive to the fact of payment, specifying when, where, and to whom it was made; but such allowances, in the whole, must not exceed five hundred dollars in any one estate; if the estate be solvent, and the executor or administrator has paid in good faith, a debt or debts against the decedent which have not been presented for allowance, and if such debt or debts are just, and would have been entitled to be allowed if properly presented for allowance, then, if such facts be proven by competent evidence, the court should allow the amount of the debt or debts so paid, in the settlement of the accounts of the executor or administrator.

When such account is rendered for settlement, the clerk of the court must appoint a day for the settlement thereof, and give notice thereof, by posting proper notices in at least three public places in the county; upon the hearing, at the time of the settlement of the account, the court or judge thereof, if he deem such notice insufficient, may order such further notice of the settlement of the account to be given, as the judge or court may deem proper; if the account be for a final settlement, and a petition for a final distribution of the estate be filed with the account, the notice of settlement must state those facts; the notice must be given by posting or publication for a least ten days prior to the settlement; on the settlement of said account, distribution and partition of the estate to all entitled thereto, may be immediately had, without further notice or proceedings.

On the day appointed, or on any subsequent day to which the hearing may be postponed by the court, any person interested in the estate may appear and file his exceptions in writing to the account, and contest the same. All matters, including allowed claims not passed upon or settlement of any former account, or, on the rendering of an exhibit, or, on making a

decree of sale, may be contested by the heirs for cause shown. The hearing and the allegations of the respective parties may be postponed from time to time when necessary; and the court may appoint one or more referees to examine the accounts and make reports thereon, subject to confirmation; a reasonable compensation is to be allowed to the referees, to be paid out of the estate of the decedent. The settlement of the account and the allowance thereof by the court or upon appeal, is conclusive against all persons interested in the estate, saving, however, to all persons laboring under any legal disability, a right to move for cause to reopen and examine the account, or to proceed by action against the executor or administrator, either individually, or upon his bond, at any time before distribution; and in such action the allowance and settlement of the account will be prima facie evidence of its correctness. The account must not be allowed by the court until it is first proved that notice has been given as required by chapter X, title II, part III of the Code of Civil Procedure; and the decree of the court showing that such proof was made to the satisfaction of the court is conclusive evidence of the fact.[2]

There is no provision in the Code of Civil Procedure, authorizing a Superior Court in the exercise of its probate jurisdiction, to compel the executor or administrator of an administrator or executor, to settle the account of his testator or intestate with the estate of which he was the administrator or executor. This, however, can be done by a Superior Court in the exercise of its equity jurisdiction.[3]

When the account of the executor or administrator has been settled and allowed, and on such settlement and allowance, it appears that there is money of the estate in the hands of the executor or administrator for, or towards, the payment of the debts of the decedent, the court must direct that such payment be made and in the following order:

1. Funeral expenses.
2. The expenses of the last sickness.
3. Debts having preference by the laws of the United States.

2. Code of Civil Procedure, Secs. 1622, 1688.
3. Bush v. Lindsey, 44 Cal. 121.

4. Judgments rendered against the decedent in his lifetime, and mortgages in the order of their date.

5. All other demands against the estate.[4]

The preference so given to a mortgage, only extends to the proceeds of the property mortgaged.[5] If there be not sufficient funds in the hands of the executor or administrator to pay such debts in full, the court must designate in its decree the amount to be paid to each creditor, but the creditor of any one class shall receive no payment, until all those of the preceding class are fully paid.[6]

When a creditor, whose claim is allowed, but is not due, assents to a deduction therefrom, of the legal interest for the time the claim has yet to run, he is entitled to payment on the amount remaining after such deduction is made.

If the creditor does not consent to such deduction, then the amount of his claim, and the amount of contingent and disputed claims, are to be ordered to be paid into court, to be paid when the claimant is entitled thereto, and if the holder of a contingent or disputed claim fails to establish his claim, or any part thereof, the part thereof not established, must be paid or distributed as the circumstances of the estate may require.

By the provisions of section 1640 of the Code of Civil Procedure an order may be made, pending the settlement of an estate, on the petition of any party interested therein, and upon good causes shown therefor after due notice by publication of the petition, that moneys in the hands of the executor may be invested for the benefit of the estate in securities of the United States or of the state of California.

When a decree is made by the court for the payment of creditors, the executor or administrator is personally liable to each creditor for his allowed claim, or the dividend to be paid thereon, and execution may be issued on such decree for the payment thereof, and the executor or administrator is liable on his bond, to each creditor for such allowed claim, or the dividend thereon so decreed to be paid. It is provided in section 1650 of the Code of Civil Procedure, that no creditor whose claim was

4. Code of Civil Procedure, Sec. 1643.
5. Code of Civil Procedure, Sec. 1644.
6. Code of Civil Procedure, Secs. 1645, 1647.

not included in the order for the payment of claims, has any right to call upon the creditors who have been paid, or upon the heirs, devisees or legatees, to contribute to the payment of his claim; but if the executor or administrator has failed to give the notice to creditors as prescribed in section 1491 of the Code of Civil Procedure, such creditor may recover on the bond of the executor or administrator the amount of his claim, or such part thereof as he would have been entitled to, had it been allowed. That section 1650, however, does not apply to a creditor whose claim was not due ten months before the day of the settlement of the account, or was contingent, and did not become absolute ten months before such day.

When the whole of the debts of the decedent has been paid, the court must direct the payment of the legacies, if any, and the distribution of the estate among heirs, legatees, or other persons entitled thereto; but unless the estate be in a proper condition to be closed, the court must give a reasonable extension of time for a final settlement of the estate.

If an executor does not render his final account when it is his duty so to do, the court may compel him to render such account.[7]

The position of an executor or administrator of the estate of a decedent is one of trust; he should, under the order of the court dispose of so much of the estate of the decedent as may be necessary for the purpose of realizing therefrom money sufficient to pay the expenses of the administration of the estate, the family allowance for the family of the decedent, his funeral expenses, and the expenses of his last sickness and his debts. The family allowance must be paid in preference to all other charges, except the funeral expenses of the deceased, and the expenses of the administration of his estate. As soon as the executor or administrator has sufficient funds in his hands for that purpose, he should, after retaining sufficient money to pay the necessary expenses of the administration of the estate of the decedent, pay, first the funeral expenses of the decedent; second, the family allowance, and third, the expenses of the last sickness of the decedent; but he is not compelled to pay any other debt of the decedent until ordered by the court so to do.

7. Code of Civil Procedure, Secs. 1640, 1653.

The executor or administrator should render the exhibits and accounts as prescribed by statute and may be compelled by the court to do so; and when the debts of the decedent, or dividends thereon are paid as ordered by the court, he should file his final account, as it is called, of the administration of the estate of the decedent. The executor or administrator should be careful not to mingle the funds of an estate, with his own funds and should be careful not to use any of the funds of the estate except in the administration of the estate.

If an executor, within a reasonable time, neglects to render an account and a waste of the estate results from such neglect, the executor is liable for such waste.[8] An executor who is guilty of great delay in accounting, is chargeable with legal interest on balances, with annual rests.[9]

When the executor has mingled money of the estate with his own funds, and omitted the money so mingled from his account, he should be charged with interest thereon.[10]

An administrator who uses the funds of his decedent's estate for his own profit is liable for interest at the legal rate with annual rests.[11]

When an executor uses funds of the estate for any purpose of his own, he should be charged with legal interest on the funds so used, with the annual rests.[12]

An executor or administrator should be allowed in his account the reasonable fee for his attorney,[13] and in fixing the amount of such fee the court is not bound by the opinion of witnesses.[14]

The fee of an attorney to represent an estate, appointed by the court under the provisions of section 1510 of the Code of Civil Procedure should be fixed by the court making the appointment, although such services were in part in the Supreme Court, and if the judgment is against the person prosecuting the claim

8. Estate of Osborn, 87 Cal. 1.
9. Estate of Sanderson, 74 Cal. 199.
10. Estate of Herteman, 73 Cal. 545.
11. Merrifield v. Longmire, 66 Cal. 180.
12. Estate of Lux, 100 Cal. 609; Estate of Clark, 53 Cal. 355.
13. Estate of Gasq, 42 Cal. 289; Estate of Levison, 108 Cal. 450.
14. Estate of Dorland, 68 Cal. 281; Freese v. Pennie, 110 Cal. 467.

against the estate, such person must pay all costs, including the reasonable fee of such attorney fixed by the court.[15]

The expenses of repairs reasonably necessary to keep the property of the estate of a decedent in good order; and expenses for repairs or improvements on such property required by the ordinances of a city to be made, should be allowed in the account of the executor or administrator; but it is safer to procure an order of the court to make such repairs or improvements.[16]

When a portion of an estate of a decedent was not appraised but was disposed of by the executor, the court may take testimony as to its value without any appraisement.[17]

When no compensation for an executor has been provided in the will of the decedent, executors and administrators, unless they waive all claim therefor, are entitled to commissions and for extraordinary services under the provisions of section 1618 of the Code of Civil Procedure.

Such commissions, however, can be allowed only on the estate of the decedent which has come into the possession of the executor or administrator.[18]

The executor or administrator is not entitled to commissions on real property which has been recovered from him by a person claiming the same adversely.[19]

An executor or administrator is not entitled to be credited with his commissions, except in his final account, but he is entitled to the traveling expenses of himself and of his attorney when on business of the estate, and with all proper expenses in the administration of the estate.[20]

A final account must mean the account of the administrator on which is to be based the order of the court to pay the debts of the decedent, otherwise, it would be impossible, in case such debts could not be paid in full, to determine what portion thereof is to be paid, unless the court settles an account containing the credit to the executor or administrator for his commissions.

15. Estate of Painter, 78 Cal. 625.
16. Estate of Clos, 110 Cal. 494.
17. Estate of Garrity, 108 Cal. 463.
18. Estate of Simmons, 43 Cal. 543.
19. Estate of Ricaud, 70 Cal. 69.
20. Estate of Rose, 80 Cal. 166.

When an executor or administrator resigns or is removed he should be allowed in his final account, commissions on the portion of the estate fully administered by him; and his proportion of the balance of the commission must be determined at the time his successor's final account is settled.[21]

He is not to be allowed the fee of his attorney in a contest to procure his administration of the estate.[22]

When the court has made its order for the payment of the debts of an estate they should be paid promptly.

Upon the final settlement of the account of the executor or administrator, or at any subsequent time the executor or administrator, or any heir, legatee or devisee may apply to the court for an order distributing the residue of the estate of a decedent if any among the persons who are by law entitled thereto.

If a minor heir of a decedent who was his child or the issue of such child, dies unmarried before the distribution of the estate, the part of the estate to which such child, or the issue of such child would have been entitled by inheritance, if living, must be distributed to the other heirs at law.[23]

When an application for distribution of the estate is filed by any executor, administrator, heir, devisee or legatee, the clerk of the court must set it for hearing by the court and give notice thereof by posting such notice in at least three public places of the county. If upon the hearing, the court or the judge thereof deem the notice, from any cause, to be insufficient, the judge may order such further notice to be given as may to him seem proper. If partition be applied for, the decree of distribution shall not divest the court of jurisdiction to order partition as provided in Art. II of chapter XI of the Code of Civil Procedure, which relates to the partition and settlement of the estates of deceased persons, unless the estate is finally closed.[24]

It is provided in section 1669 of the Code of Civil Procedure that no distribution shall be ordered unless the court is satisfied that all taxes legally levied on the personal property of the estate have been paid.

21. Estate of Barton, 55 Cal. 87.
22. Estate of Barton, 55 Cal. 87.
23. Code of Civil Procedure, Sec. 1665.
24. Code of Civil Procedure, Sec. 1668.

It is provided further in section 3752 of the Political Code that the Superior Court must require the executor or administrator to pay out of the funds of the estate all taxes due from the estate, and that no order or decree for the distribution of any property of an estate shall be made until all taxes against the estate have been paid.

When an executor or administrator has complied with the final decree for the distribution of the estate of a decedent, the executor or administrator is entitled to a decree of the court discharging him from his trust as such executor or administrator.[25]

25. Code of Civil Procedure, Sec. 1697.

CHAPTER LVI.

OF THE SUSPENSION AND REMOVAL OF AN EXECUTOR OR ADMINISTRATOR AND A REVOCATION OF HIS POWERS, AND OF EVIDENCE OF THEIR POWERS TO ACT.

When letters of administration have been granted to any person other than the surviving husband or wife, child, father, mother, brother or sister of the intestate, then the surviving husband or wife of a decedent, who has not requested the appointment of another person to administer on the estate of a decedent, and who by reason of such request has been appointed such administrator, and a child, father, mother, brother, or sister of a decedent, who have not so requested the appointment of another person to act, and who has acted as the administrator of the estate, and who is competent to act as such administrator, or any competent person at the written request of one of them, may obtain the revocation of letters of administration and may have letters of administration issued to himself or to herself.

The surviving husband or wife of the decedent, or their nominee, if competent, has the preference over any other person to such letters.[1]

After due proof and probate by the court of a will of a decedent, after granting letters of administration on the ground of intestacy, such letters must be revoked and the power of the administrator must cease.[2]

Letters of administration on an estate, or letters testamentary, may be revoked, if the executor or administrator neglect to comply with an order of the court to give further security, or to file a new bond within the time prescribed by the order.[3]

1. Code of Civil Procedure, Secs. 1383, 1386.
2. Code of Civil Procedure, Sec. 1423.
3. Code of Civil Procedure, Secs. 1399, 1400.

Letters testamentary or of administration may be revoked of an executor or administrator, on his resignation and delay in the settlement of his accounts on such resignation.[4]

When a judge of the Superior Court has reason to believe that any executor or administrator has wasted, embezzled, or mismanaged an estate, or is about to waste or embezzle the property of the estate, or has committed or is about to commit a fraud upon the estate, or is incompetent to act, or has permanenly removed from the state, or has wrongfully neglected the estate, or has long neglected to perform any act as executor or administrator, he may suspend the powers of such executor or administrator, until the matter is investigated, and if the court find on such investigation after due notice given to the executor or administrator that such belief is well founded, the executor or administrator must be removed from his trust, and his letters revoked.[5]

If an executor or administrator neglects or refuses to return an inventory within the time prescribed, his letters may be revoked.[6]

Letters testamentary or of administration may be revoked for contempt, in disobeying a lawful order of the court or of a judge thereof.[7]

In case of the suspension of an executor or administrator, or the revocation of his letters, and delay in the appointment or qualification of his successor, a special administrator of the estate should be appointed as provided in the Code of Civil Procedure.[8]

A transcript from the minutes of a court showing the appointment of a person as an executor or administrator, together with the certificate of the clerk, under his hand and seal, that such person has given bond and has qualified, and that letters testamentary or of administration have been issued to him, and that they have not been revoked, shall have the same effect in evidence as the letters themselves.[9]

4. Code of Civil Procedure, Sec. 1427.
5. Code of Civil Procedure, Secs. 1436, 1437.
6. Code of Civil Procedure, Sec. 1450.
7. Code of Civil Procedure, Sec. 1721.
8. Code of Civil Procedure, Sec. 1411 et seq.
9. Code of Civil Procedure, Sec. 1429.

CHAPTER LVII.

OF PARTIAL DISTRIRBUTION, ASCERTAINING OF HEIRS, OF AGENTS, AND OF TRUSTS IN AN ESTATE, OF GENERAL PROVISIONS.

Unless it satisfactorily appear to the court that the rents, issues and profits of the real estate of a decedent, for a longer period are necessary to be received by the executor or administrator of the estate of a decedent, to pay the debts of the decedent or that it will probably be necessary to sell the real estate of the decedent for the payment of such debts, the court, at the end of the time limited for the presentation of claims against the estate, must direct the executor or administrator to deliver possion of all such real estate to the heirs at law or to the devisees of such decedent.[1]

A person claiming to be the heir of a decedent may institute proceedings to determine who the heirs are; such proceedings may be commenced at any time within one year after the issuance of letters testamentary or of administration upon the estate of the decedent.

The provision of the Code of Civil Procedure which give this right in the probate court was passed in 1885.[2]

At any time after the lapse of four months after the issuing of letters testamentary or of administration on the estate of a decedent, any heir, devisee, or legatee of such decedent, may present his petition to the court for the legacy or share of the estate to which he is entitled to be given to him, upon his giving bonds with sufficient security for the payment of his proportion of the debts of the estate.[3]

Due notice should be given of a hearing of the application, and if it appear at such hearing that the estate is but

1. Code of Civil Procedure, Sec. 1453.
2. Code of Civil Procedure, Sec. 1664.
3. Code of Civil Procedure, Sec. 1658.

little indebted, and that the prayer of the petition may be granted without loss to the creditors of the estate, the prayer of the petition, if just, should by an order of the court be granted.[4]

At any time after one year after the issuance of letters testamentary or of administration, an heir, legatee, or devisee of the decedent may present his or her petition to the court for the distribution of the net proceeds of the share of said estate to which he or she is entitled, and if it appear at the hearing that the prayer of the petitioner may be granted without loss to any of the creditors of the estate, such prayer, if just, should be granted by an order of the court, and the court may dispense with a bond.[5]

When any estate other than money is assigned or distributed by a judgment or decree of a probate court, to any person residing out of the state, and who has no agent in the state, the court may, when proper so to do, appoint an agent for such absent person to receive the portion of such estate, other than money, so assigned or distributed.

When money is distributed to such absent person, or to a minor or incompetent person, who has no lawful guardian to receive the same, it may be deposited with the county treasurer.

When an agent is appointed by the court, he must give a bond, and is to be allowed by the court a reasonable compensation for his services as such agent.[6]

The powers, duties and responsibilities of such agent, are prescribed in sections 1693, 1694 and 1695 of the Code of Civil Procedure.

When any person appears and claims any such money paid in the county treasury, the claim must be investigated by the court, and if the court is satisfied on such investigation that he is entitle thereto, the court will grant, under the seal of the court, a certificate to that effect.[7]

When any trust, by or under any will is to continue after

4. Code of Civil Procedure, Sec. 1661.
5. Code of Civil Procedure, Sec. 1663.
6. Code of Civil Procedure, Secs. 1691, 1709 1-2.
7. Code of Civil Procedure, Sec. 1696.

distribution, the probate court retains jurisdiction for the purpose of the settlement of accounts under the trust.[8]

Orders and decrees made by the court or judge thereof, in probate proceedings need not recite the existence of facts or the performance of acts upon which the jurisdiction of the court or judge depends except as otherwise provided.[9]

Notice is imparted of the contents of any order or decree of the probate court, or a judge thereof, or of a copy thereof, required to be recorded in the office of the county recorder, from the time of filing the same for record.[10]

A citation issued from a probate court must be served in the same manner as a summons in a civil action.[11]

When personal notice is required, and no mode of giving it is prescribed, in probate proceedings, such notice must be given by citation; when no other time is specially prescribed, citations must be served at least five days before the return day thereof.[12]

When a complete description of real property sought to be sold has been given and published in a newspaper as required in an order to show cause why a sale of real estate should not be made, such description need not be published in any subsequent notice of sale, or notice of a petition for the confirmation thereof; it is sufficient to refer to the description contained in the publication of the first notice as being proved and on file in the court.[13]

An appeal to the Supreme Court must be taken within sixty days from the time of the entry of the order, decree or judgment of a probate court appealed from.[14]

The provisions of the Code of Civil Procedure relative to new trials and appeals, except in so far as they are inconsistent with the provisions of that code relative to proceedings in probate courts, apply to proceedings in such court.[15]

If no jury is demanded, the court must try the issues joined. If on a written demand a jury is called by either party, and the issues are not sufficiently made up by the written pleadings on

8. Code of Civil Procedure, Sec. 1699.
9. Code of Civil Procedure, Sec. 1704.
10. Code of Civil Procedure, Sec. 1706.
11. Code of Civil Procedure, Sec. 1709.
12. Code of Civil Procedure, Secs. 1710, 1711.
13. Code of Civil Procedure, Sec. 1712.
14. Code of Civil Procedure, Sec. 1715.
15. Code of Civil Procedure, Sec. 1714.

file, the court on due notice must settle and frame the issues to be tried.[16]

A trial by a jury of the issues raised by a contest to the account of an administrator of the estate of a decedent, is not a matter of right.[17]

In all proceedings where all parties interested in an estate are required to be notified of such proceedings, the court may in its discretion, appoint some competent attorney at law to represent in all such proceedings the devisees, legatees, heirs, or creditors of the decedent, who are minors, and have no general guardian in the country, or, who are non-residents of the state, and those interested, who, though they are neither such minors, or non-residents, are unrepresented.

The fee of such attorney is to be paid out of the funds of the estate, and upon distribution, may be charged to the party represented by the attorney.[18]

When a judgment or decree is made affecting title to real property, a certified copy of the same must be recorded in the office of the county recorder of the county in which the property is situated.[19]

When not otherwise prescribed by the Code of Civil Procedure in probate proceedings, the Superior Court, or the Supreme Court on appeal, may, in its discretion, order costs to be paid by any party to the proceedings or out of the assets of the estate, as justice may require.[20]

Personal service upon the guardian of the estate of a ward, when such guardian resides in this state, of any process, notice or order of the court, concerning the estate of a deceased person in which the ward is interested is equivalent to service on the ward.

Such guardian may also appear for his ward and waive any

16. Code of Civil Procedure, Sec. 1717.
17. Estate of Moore, 72 Cal. 335; Estate of Westerfield, 96 Cal. 113.
18. Code of Civil Procedure, Sec. 1718.
19. Code of Civil Procedure, Sec. 1719.
20. Code of Civil Procedure, Sec. 1720.

process, notice, or order to show cause, which an adult, or a person of sound mind might do.[21]

The legislature provided in 1897 for a determination by the probate court as to whether a life estate had terminated in certain cases.[22]

21. Code of Civil Procedure, Sec. 1722.
22. Code of Civil Procedure, Sec. 1723, as amended in 1897.

CHAPTER LVIII.

OF THE PUBLIC ADMINISTRATOR.

There is elected in each county of California a public administrator.

It is the duty of the public administrator to take charge of the estates of persons dying within his county.

1. Of the estates of decedents for which no administrators are appointed, and which in consequence thereof are being wasted, uncared for or lost.

2. Of estates of decedents who have no known heirs.

3. Of estates ordered into his hands by the court.

4. Of estates upon which letters of administration have been issued to him by the court.[1]

The official bond and oath of a public administrator are in lieu of an administrator's bond and oath; but when real estate is ordered to be sold, another bond may be required by the court.

Public administrators may administer oaths in regard to all matters touching the discharge of their duties, or the administration of an estate in their hands.[2]

When a public administrator is appointed the administrator of an estate of a decedent, he must be guided in the discharge of his duties and in the administration of the estate, as is prescribed for other administrators, except as is otherwise prescribed in chapter XIII of the Code of Civil Procedure relating to the proceedings in probate courts.[3]

Particular duties, powers and obligations of a public administrator are set out in the Code of Civil Procedure, sections 1726, 1744.

1. Code of Civil Procedure, Sec. 1727.
2. Code of Civil Procedure, Sec. 1742.
3. Code of Civil Procedure, Sec. 1743.

CHAPTER LXIX.

OF GUARDIANS AND WARDS.

The father of a legitimate minor while living with the mother is the guardian by nature of the person of such minor; and in case of his death, the mother is such guardian; but when they live apart and separate from each other, the husband and father as such, has no right superior to the wife and mother, in regard to the care, custody, education and control of their minor child.[1]

No person, whether a parent or otherwise, has any power as guardian of property, except by appointment by a court.[2]

A guardian of the person or estate of a minor or of both, may be appointed by will or deed to take effect upon the death of the parent appointing.[3]

A guardian appointed by deed is a testamentary guardian, and must qualify by giving a bond and taking the requisite oath.[4]

A testamentary guardian cannot take from a parent, who is the natural guardian of a minor child, the care, custody, and tuition of the child, if such parent is competent, willing and worthy to have the custody and tuition of the child.[5]

The Superior Court of a county has general jurisdiction in respect to minors who are residents of such county.[6]

There cannot be two guardianships of a minor at the same time, and the Superior Court, in which the proceedings were first

1. Civil Code, Secs. 197, 198.
2. Civil Code, Sec. 242.
3. Civil Code, Sec. 241.
4. Code of Civil Procedure, Sec. 1758; Murphy v. Superior Court, 84 Cal. 592.
5. Lord v. Hough, 37 Cal. 657.
6. Murphy v. Superior Court, 84 Cal. 592; Guardianship of Rayner, 74. Cal. 421; Guardianship of Vance, 92 Cal. 195.

commenced to appoint a guardian for a minor, has jurisdiction on the service of a proper citation to determine the residence of the minor at the time such proceedings were commenced.[7]

When the minor resides out of the state the notice to be given on the application for the appointment of a guardian is a matter in the discretion of the judge or of the court in which such application is made.[8]

The guardian of a minor, is not a trustee of an express trust.[9]

The guardian of a minor cannot sue in his own name to recover money due the minor.[10]

A guardian cannot sell the property of his ward without the order of the court which appointed him such guardian;[11] except as provided by section 23 of the General Railroad Act of May 20, 1861, as amended April 27, 1863, upon the sale, if made, of real estate to a railroad company being approved by the probate judge.[12]

The guardian of a minor appointed in another state cannot by virtue of such appointment, convey the real estate of his ward situated in California.[13]

A note and mortgage, given by a guardian to his ward for money of the ward used by the guardian is valid, and the guardian has no authority to satisfy such mortgage of record, unless the mortgage debt be paid.[14]

The appointment by the court of a person other than the parents as guardian, made on notice to such parents, cannot be collaterally attacked.[15]

If there be no such notice to the parents of the minor the appointment may be collaterally attacked.[16]

Section 1747 of the Code of Civil Procedure provides for the appointment by the Superior Court in a county, of a guard-

7. Guardianship of Danneker, 67 Cal. 643.
8. Gronfier v. Puymirol, 19 Cal. 629.
9. Fox v. Minor, 32 Cal. 111.
10. Fox v. Minor, 32 Cal. 111.
11. Kendall v. Miller, 9 Cal. 592.
12. Hodgdon v. Southern Pacific R. R. Co., 75 Cal. 642.
13. McNeal v. First Congregational Society, 66 Cal. 105.
14. Jennings v. Jennings, 104 Cal. 150.
15. Ex parte Miller, 109 Cal. 643.
16. In re Hunt, 108 Cal. 355.

ian for minor inhabitants or residents in the county, who have no guardian legally appointed by deed or will; and for minors who reside out of the state, but who have estate in the county.

Section 1763 of the same code provides for the appointment by that court, of a guardian of an insane or incompetent person.

A guardian appointed by the court must give a bond required by the court to be given;[17] and render account to the court within three months after his appointment, and he must make and file an inventory of the estate of his ward within such time as the court may order.[18]

And this bond and the letters of guardianship issued must be recorded by the clerk of the court. The oath of the guardian that he will perform the duties of his office as such guardian according to law must be endorsed on such letters.[19]

A person declared to be insane or incompetent, or any friend of such person may have the question of insanity or of incompetency of such person, after the appointment of a guardian for such person, determined by the verdict of a jury, on a petition presented to the court for that purpose.[20]

A guardian must appear for, and represent his ward in all legal suits and proceedings unless another person is appointed by the court for that purpose.[21]

A guardian may join in, and assent to a partition of the real estate of the ward whenever such assent may be given by any person.[22]

A guardian must upon the expiration of a year from the time of his appointment, and as often thereafter as he may be required, present his account to the court for settlement and allowance;[23] and must present such account on the expiration of his trust.

Every guardian must be allowed the amount of his reasonable expenses incurred in the execution of his trust, and he must

17. Code of Civil Procedure, Sec. 1754.
18. Code of Civil Procedure, Secs. 1754, 1773.
19. Code of Civil Procedure, Secs. 1754, 1756.
20. Code of Civil Procedure, Sec. 1766.
21. Code of Civil Procedure, Secs. 1769, 372.
22. Code of Civil Procedure, Sec. 1772.
23. Code of Civil Procedure, Sec. 1774.

also have such compensation for his services as the court in which his accounts are settled deems just and reasonable.[24]

When it appears to the satisfaction of the court, upon the petition of the guardian, that for the support and maintenance of the ward, or for the benefit of the ward, his real estate or some part thereof should be sold and the proceeds thereof put out at interest or invested in some particular stock, or in the improvement or security of any other real estate of his ward, his guardian may sell the same for such purpose, on obtaining an order therefor.[25]

A guardian authorized to sell estate must before the sale give a bond with sufficient surety to be approved by the court, or a judge thereof, with condition to sell the same in the manner, and to account for the proceeds of the sale as provided by chapter XIV and chapter VII of the Code of Civil Procedure which relate to proceeding in probate courts.[26]

Such order of sale, if made, continues in force one year.[27]

When the guardian and ward are both non-residents of the state, personal property of the ward may, by the order of the court, be removed to the country of the residence of the ward.[28]

The marriage of a ward terminates the guardianship of his person, but does not terminate the guardianship of his estate.[29]

No action can be maintained on the bond of a guardian or for the recovery of real estate sold by him unless it be commenced within three years after the termination of the guardianship, saving, however, to persons under a disability to sue when the cause of action accrues, three years after this disability is removed the right to commence such an action is barred.[30]

A guardian of a minor appointed by a court is not entitled to his discharge until one year after the ward's majority.[31]

All the proceedings under the petition of guardians for sales of property of their wards, giving notice, etc., must be had and

24. Code of Civil Procedure, Sec. 1776.
25. Code of Civil Procedure, Sec. 1778.
26. Code of Civil Procedure, Sec. 1788.
27. Code of Civil Procedure, Sec. 1790.
28. Code of Civil Procedure, Secs. 1797, 1798.
29. Code of Civil Procedure, Sec. 1802.
30. Code of Civil Procedure, Secs. 1805, 1806.
31. Civil Code, Sec. 257.

made as required by the provisions of the Code of Civil Procedure concerning estates of decedents, unless otherwise provided specially in the chapter of that code respecting guardians and wards.[32]

If a sale of the real estate of the ward is asked for on the grounds of expediency alone, the petition for such sale need not state the condition of all the real estate of the ward.[33]

32. Code of Civil Procedure, Sec. 1789.
33. Smith v. Biscailus, 83 Cal. 344.

CHAPTER LX.

OF THE WRIT OF HABEAS CORPUS.

The writ of habeas corpus is the remedy which the law gives for the enforcement of the civil right of personal liberty.[1]

This remedy is a common law remedy, and it is guaranteed by the constitution of the United States and of the state of California, and of other states in the United States, unless when, in case of rebellion or invasion the public safety may require its suspension.[2]

The Code of Civil Procedure has no provisions respecting this remedy, but provisions relating to it are contained in the Penal Code, sections 1473, 1505.

This remedy is used to place a minor in proper custody.[3]

It is also used for the purpose of giving, by a person who is imprisoned or detained in custody on a criminal charge for want of bail, of proper bail.[4]

In California, Superior Courts and judges thereof have jurisdiction to issue the writ on petition, by, or on behalf of any person held in actual custody in their respective counties.

The Supreme Court or any justice thereof has jurisdiction to issue the writ on petition, by, or on behalf of any person held in actual custody *in any part of the state,* and to make the writ returnable before the court, or any of the justices thereof, or before any Superior Court, or before any judge thereof.[5]

The person or officer to whom the writ is directed must make his return thereon as commanded by the writ, and must

1. Ex parte Tom Tong, 2 U. S. Supreme Court Rep. 371.
2. U. S. Const. Art. I, Sec. 9; California Const. Art. I, Sec. 5.
3. Wilcox v. Wilcox, 22 Barb. 178; Ex parte Miller, 109 Cal. 648; Ex parte Hunt, 108 Cal. 355; Penal Code, Sec. 1493.
4. Penal Code, Sec. 1490.
5. Cal. Const. Art. VI, Secs. 4 and 5.

state in his return the matters required to be stated therein by the provisions of section 1480 of the Penal Code; and this return must be signed by the person making it and the return must be verified by his oath, unless the person making the return is a sworn public officer.[6]

The person to whom the writ is directed, if it is served on him, must bring the body of the party in whose behalf the writ is issued, if in his custody or under his restraint, before a court or judge, according to the commands of the writ, except in the cases specified in section 1482 of the penal code.[7]

The party brought before the court or judge on the return of the writ may deny or controvert any of the material facts or matters set forth in the return or except to the sufficiency thereof, or allege any fact to show either that his imprisonment or detention is unlawful, or that he is entitled to his discharge.[8]

The penal code contains provisions for the issuance of a warrant to bring the person held in illegal custody, confinement or restraint, before the court or judge, who is authorized by law to issue the writ of habeas corpus, when there is reason to believe that such person will be carried out of the jurisdiction of the court or judge before whom the application for the writ is made, or will suffer some irreparable injury before compliance with the writ of habeas corpus can be enforced; and there may be inserted in such warrant a command for the apprehension of the person charged with such illegal detention and restraint and for proceedings after the issuance of such warrant.[9]

The petition for a writ of habeas corpus must be verified.[10]

A state court or judge has no authority to release a prisoner on habeas corpus when the prisoner is in the custody of the authorities of the United States, pursuant to a judgment of conviction of a federal tribunal having exclusive jurisdiction in the case.

When a state court or judge is judicially apprised that the party is in custody under the authority of the United States, the state court or judge can proceed no further.[11]

6. Penal Code, Sec. 1480.
7. Penal Code, Sec. 1481.
8. Penal Code, Sec. 1484.
9. Penal Code, Secs. 1497, 1502.
10. Penal Code, Sec. 1474.
11. Ex parte Le Bur, 49 Cal. 161; Albeman v. Booth, 21 How. U. S. 523.

A judgment of a court having jurisdiction of the subject matter and of the person, cannot be collaterally attacked in proceedings by habeas corpus, when the judgment is of conviction for a contempt of court.[12]

When a party is convicted of an offense by a court having jurisdiction of the person and of the offense for which he was tried, he cannot be discharged on habeas corpus because of errors of law committed by the trial court.[13]

Habeas corpus is a proper remedy for every unlawful imprisonment, both in civil and criminal cases.[14]

The question of the authority of the court that adjudges a person guilty of a criminal offense is one which is always within the limits prescribed to the judicial inquiries of a court issuing a writ of habeas corpus.[15]

As a general rule, the sufficiency of a criminal complaint or indictment, or of the evidence to support it, cannot be inquired into on habeas corpus; but if the facts charged in a criminal complaint or indictment, and proved, do not constitute a public offense, the person so charged, if imprisoned under such charge, will be discharged on habeas corpus.[16]

When it affirmatively appears from the record of the proceedings in an inferior court that a person was imprisoned for an act which is not a crime, he will be discharged on habeas corpus.[17]

Error of a court which is subject to review by a higher court, is no ground for a discharge on a writ of habeas corpus.[18]

There is no appeal in California from the decision of a judge made in habeas corpus proceedings, but the decision of one court or judge refusing to discharge a prisoner on habeas corpus is not a bar to another application for the same writ to another court or to a judge having jurisdiction to issue the writ.[19]

12. Ex parte Ah Men, 77 Cal. 199; Ex parte Henshaw, 73 Cal. 486.
13. Ex parte Lehmkuhl, 72 Cal. 53; Ex parte Max, 44 Cal. 580, overruling Ex parte Ah Cha, 40 Cal. 426.
14. Ex parte McCullough, 35 Cal. 97.
15. Ex parte Hollis, 59 Cal. 405; Ex parte Mirande, 73 Cal. 365.
16. Ex parte McNulty, 77 Cal. 164.
17. Ex parte Kearney, 55 Cal. 212; Ex parte Vinich, 86 Cal. 71; Ex parte Keeny, 84 Cal. 304.
18. Ex parte Walpole, 85 Cal. 362.
19. Ex parte Perkins, 2 Cal. 424; Matter of Ring, 28 Cal. 247.

If an indictment state facts as an offense, which do not constitute any public offense known to the law, a person imprisoned by reason of such indictment will be discharged from such imprisonment on habeas corpus.[20]

When a person has been committed on a criminal charge without reasonable or probable cause, he will be discharged from such imprisonment on habeas corpus; but the petition for the writ must set out what the evidence on the examination was.[21]

A person must not be discharged on habeas corpus on the ground of mere defect of form in the warrant of commitment; nor if it appears to the court or judge before whom the writ was returned by affidavit or otherwise, that the person has committed a criminal offense and should not be discharged; but there must be had an examination before the court or judge before whom the writ was returned.

If it appear on the return of the writ that a proper judgment of conviction was rendered and entered a reasonable time will be given to procure a copy of such judgment.[22]

20. Matter of Corryall, 22 Cal. 178.
21. Penal Code Sec. 1487; Ex parte Walpole, 84 Cal. 584; Ex parte Buckley, 105 Cal. 123.
22. Penal Code, Secs. 1488, 1489; Ex parte Ring, 28 Cal. 247.

APPENDIX.

FORMS AND EXPLANATIONS RESPECTING THEM.

Forms have long been in use in actions and civil proceedings.

Under the common law system, forms for pleadings and for proceedings in actions were used; and when such forms had received the approval of the courts they became precedents for use in subsequent cases.

Under the California code system there is but one form of action; and the code provides that the complaint in an action must contain the title of the action, a statement of facts constituting the cause of action in ordinary and concise language, and a demand of the relief which the plaintiff claims; and it is held by the courts that the *ultimate* facts which constitute plaintiff's cause of action should be stated in the complaint, and that inferences from facts and conclusions of law should not be stated therein.

I have prepared the forms for pleadings contained in the following pages after a careful examination of the provisions of the California Code of Civil Procedure, precedents for pleadings in common law actions, and many forms for pleadings which have been used in actions under the code system. I have omitted from the forms for pleadings statements of conclusions of law and of inferences from facts except in cases in which from long usage, a statement of a conclusion of law, when such conclusion of law is from facts alleged, has the sanction of long usage.

Forms for other proceedings have been prepared after a careful study of the provisions of that code, and an examination of many forms in use.

In most of the following forms I have stated the allegations and denials positively; but if the pleading be verified such

allegation or denial, if not true of the knowledge of the party making them, should be made on his information and belief.

The title of a cause consists of the name of the court and of the parties to the action.

In most of the following forms I have used the words, "Name of Court," to indicate the place where the name of the court and of the parties to the cause should be inserted; and have used the word "venue" to indicate where the words "State of ———, county of ———," showing such venue, should be inserted, and the word "jurat" is used to show where the certificate of the officer taking an affidavit should be; and the word "date" at the end of a form, indicates where the correct date should be inserted.

In case there should be only one of two or more statements of fact made, the statement of one fact is made, and the statement of the other fact is, or other facts are, included in brackets.

In the forms for probate proceedings, and other special proceedings I have stated in a few of the forms the full title of the proceeding and in subsequent forms I have used the words, "Title of Proceeding" to indicate where the full title of the proceeding should be inserted.

The forms which I have prepared are in the order, in most cases, in which such forms are to be used.

The matters which are printed in type smaller than that used in printing the forms are inserted for the information of the persons using the forms and such matters are in some cases, repetitions embraced in previous parts of the work, but they are inserted with the forms, so that attorneys when using such forms can receive information which may then be valuable to them, although such information be contained in previous parts of the work.

FORMS FOR THE APPOINTMENT OF A GUARDIAN AD LITEM.

In California an action is commenced by filing a complaint. If the plaintiff in an action be a minor, or an insane, or an incompetent person, he must appear by his general guardian or by a guardian ad litem appointed for him by the court in which the action is to be commenced.

FORM NO. 1.

PETITION FOR THE APPOINTMENT OF A GUARDIAN AD LITEM FOR A MINOR UNDER THE AGE OF FOURTEEN YEARS, OR FOR AN INSANE, OR AN INCOMPETENT PERSON.

State of California, county of ———— ss.

To the Superior Court of the State of California, in the county of ———:

The petition of A B respectfully shows:

That C D is a minor, under the age of fourteen years, [or is an incompetent person, or is insane,] and your petitioner states on his information and belief that said minor [or said incompetent person, or said insane person,] was on the — day of ——, and has been ever since the owner of a tract of land situate in ——— county in this state, and which is described as [describe the land.]

That ever since the — day of —— one E F has withheld the possession of said real estate, and the rents, issues and profits thereof, from said C D. [Or state briefly any other cause of action, which the person for whom the guardian ad litem is asked to be appointed has.]

That your petitioner is a relative [or friend] of said C D and it is for the best interest of said C D that an action be commenced by said C D against said E F for the recovery of the possession of said real estate, and for said rents, issues and profits thereof. [Or state the other relief for which the action should be commenced.]

WHEREFORE your petitioner asks that your petitioner be appointed guardian ad litem of said C D to commence and carry on such action for him.

[*Date.*] A B.

State of California, county of ———, ss.

A B, being duly sworn, says that he has read [or heard read] the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and, as to those matters, that he believes it to be true.

[*Jurat.*] A B.

If a guardian ad litem is to be for a minor over the age of fourteen years, such minor should, himself, petition for the appointment of the guardian ad litem.

FORM NO. 2.

PETITION FOR THE APPOINTMENT OF A GUARDIAN AD LITEM FOR A MINOR, AN INSANE, OR AN INCOMPETENT PERSON, DEFENDANT, MADE BY A PLAINTIFF IN THE ACTION.

In the Superior Court of the State of California, in the county of ————:

A B, plaintiff, v. C D, defendant.

To the Superior Court of the State of California, in the County of ———:

The petition of A B respectfully shows:

That he is the plaintiff in the above entitled action;

That C D, who is a defendant in the action, is a minor of the age of about — years; [or is an incompetent person, or is an insane person.]

That a summons has been issued in the action, and such summons was served on the defendant C D in the county of ———, in this state, on the — day of ——; that said summons has been returned to this court and is on file in this action;

That more than ten days have elapsed since the time of such service and no application to have a guardian ad litem appointed for said defendant C D has been made; and petitioner states on his information and belief that said C D has no general guardian in this state.

WHEREFORE your petitioner asks that some suitable and competent person be appointed guardian ad litem for said defend-

ant C D, and that such guardian be authorized and directed to appear and defend in the action in behalf of said defendant C D.

A B.

[Verification as in Form No. 1.]

A defendant, if a minor over the age of fourteen years, may himself petition for the appointment of a guardian ad litem for himself, or if under that age, or if he be an insane or incompetent person, a relative or friend of the defendant may petition the court, in which the action is pending, for the appointment of such guardian ad litem, but if he or they fail to do so, the application for such appointment may be made by any party to the action. Code of Civil Procedure, Sec. 373.

FORM NO. 3.

ORDER OF COURT APPOINTING A GUARDIAN AD LITEM FOR PLAINTIFF.

[*Name of Court.*]

In the matter of the petition of A B for the appointment of a guardian ad litem for C D, a minor.

On reading and filing the petition of A B for the appointment of a guardian ad litem for C D, and it appearing to the satisfaction of the court that said C D is a minor, and that such guardian ad litem should be appointed;

It is ordered that A B be and he is appointed guardian ad litem for said C D, and he is authorized to commence and prosecute as such guardian for said C D, an action as mentioned in said petition.

Dated this — day of ——. ———,

Judge.

FORM NO. 4.

ORDER BY THE COURT APPOINTING A GUARDIAN AD LITEM FOR A DEFENDANT.

[*Name of Court.*]

On reading the petition of ——— on file in this action; ordered that E F be, and he hereby is, appointed guardian ad litem of the defendant C D in this action, and he is authorized and directed to appear and defend as such guardian ad litem in the action for said C D.

Dated the — day of ——. ———,

Judge.

FORMS IN AN ACTION BY OR AGAINST AN EXECUTOR OR ADMINISTRATOR, OR BY ONE WHO MUST SHOW AUTHORITY TO COMMENCE AN ACTION, OR FOR HIS DEFENSE THEREIN.

FORM NO. 5.

COMPLAINT BY AN EXECUTOR.

[*Name of Court.*]

A B as the executor of the will of C D, deceased, plaintiff, v. E F, defendant.

A B, as the executor of the will of C D, deceased, complains and alleges:

I.

That said C D died in this state on the — day of ——, and he left at the time of his death a will; and thereafter the Superior Court of the state of California, in the county of ———, by its order and decree duly given and made on the — day of ——, admitted said will to probate, and granted to said A B letters testamentary thereon, as the executor thereof, and he qualified as such executor, and such letters testamentary were issued to him on the — day of ——, and he has been ever since such executor;

II.

That on the — day of ——, and in the lifetime of said C D, he, at the request of the defendant E F, paid to one G H five hundred dollars, and in consideration thereof the defendant E F, promised to repay the same to said C D on the — day of ——;

III.

That defendant has not repaid said sum of five hundred dollars, nor any part thereof, and the whole thereof is unpaid.

WHEREFORE plaintiff demands judgment against the defendant E F for the sum of five hundred dollars, and the interest thereon from said — day of ——, and plaintiff's costs of suit.

G H,
Attorney for Plaintiff.

FORM NO. 6.

COMPLAINT BY AN ADMINISTRATOR.

[*Name of Court.*]

A B as the administrator of the estate of C D, deceased, plaintiff, v. E F, defendant.

Plaintiff complains and alleges:

I.

That said C D died in this state intestate on the — day of ——, and thereafter, by the order and decree of the Superior Court of the state of California, in the county of ———, duly given and made on the — day of ——, letters of administration on the estate of said C D, deceased, were granted to said A B; and thereafter he qualified as the administrator of said estate, and such letters of administration were issued to said A B on the — day of ——, and he has been ever since the administrator of said estate.

II.

That on the — day of —— the defendant made his promissory note in writing to said C D in his lifetime, of which the following is a copy: [Insert copy of note.]

That the said C D never sold, endorsed or transferred said promissory note, nor has this plaintiff, and the plaintiff as such administrator is the owner of said promissory note;

That said promissory note is due and wholly unpaid.

WHEREFORE plaintiff demands judgment against the defendant E F for the sum of [insert the principal of the note] and interest thereon from the — day of —— at the rate of — per cent. per annum, and plaintiff's costs of suit.

G H,
Attorney for Plaintiff.

The advantage of setting out a copy of the promissory note sued on, instead of pleading its legal effect, is this, namely, unless an answer denying the genuineness and due execution of such promissory note be verified, the genuineness and due execution thereof will be deemed admitted. Code of Civil Procedure, sec. 447. If, however, the written instrument recite a material fact in the case, such recital is not an allegation of the fact, and there must be, in the pleading, an allegation of such fact.

FORM NO. 7.

COMPLAINT AGAINST AN EXECUTOR OR ADMINISTRATOR.

[*Name of Court.*]

A B, plaintiff, v. C D, as the executor of the will [or as the administrator of the estate] of E F, deceased, defendant.

Plaintiff complains and alleges:

I.

That on the — day of ——, one E F made to one M N a promissory note in writing, of which the following is a copy: [Insert copy of note.]

II.

That M N, for a valuable consideration, sold, endorsed and transferred said promissory note on the — day of —— to plaintiff, and plaintiff has been ever since the owner and holder thereof, and the same is due and wholly unpaid;

III.

That said E F died on or about the — day of ——, and the Superior Court of the state of California in the county of ———, by its order and decree which were duly given and made on the — day of ——, granted to said C D letters testamentary [or of administration] on the estate of said E F, deceased; and said C D qualified as such executor [or administrator,] and such letters were issued to him; and he has been ever since such executor [or administrator,] and said C D as such executor [or such administrator] on the — day of ——, published in the ———, a newspaper printed and published in said county of ———, a notice to the creditors of said deceased E F, requiring all persons having claims against said deceased within four [or ten] months after the first publication of said notice, to exhibit them, with the necessary vouchers, to said C D, said executor [or administrator] at the place of his residence [or business] which was specified in said notice;

That plaintiff did on the — day of ——, and within four [or ten] months after the first publication of said notice, present his claim on said note and the endorsements thereon to the defendant for allowance; and the claim so presented contained a copy of said note and said endorsement thereon; and said claim

so presented was supported by the affidavit of plaintiff that the sum of ——— dollars, the principal of said note, and the interest thereon at the rate of — per cent. per annum from the — day of —— were justly due, and that no payment had been made thereon which was not credited, and that there was no offset to the same to the knowledge of this plaintiff, said affiant; and said promissory note and said endorsement thereon were presented with said claim, and thereafter said executor [or administrator] rejected said claim, and the same is wholly unpaid, and three months have not elapsed since such rejection.

WHEREFORE plaintiff demands judgment against said defendant for the sum of ——— dollars [the principal of said note] with interest thereon at the rate of — per cent. per annum from the — day of ——, and plaintiff's costs of suit; all to be paid in the due course of administration of the estate of E F, deceased.

G H,
Attorney for Plaintiff.

FORM NO. 8.

COMPLAINT BY A RECEIVER.

[*Name of Court.*]

A B, as the receiver of [state name of corporation,] a corporation, plaintiff, v. C D, defendant.

A B as receiver, complains and alleges:

I.

That the ——— has been, ever since the — day of ——, and is a railroad corporation organized and doing business under the laws of the state of California, and having its principal place of business in the city of ——— in that state;

II.

That between the — day of —— and the — day of ——, the said corporation rendered services for the defendant at defendant's request in carrying goods and merchandise from ——— to ——;

III.

That such services were reasonably worth ——— dollars, and the defendant promised to pay said sum of ——— dollars for such services to said corporation on the — day of ———;

IV.

That defendant has never paid for such services and has not paid for any part thereof, and said sum of ——— dollars which defendant promised to pay therefor is due and wholly unpaid;

V.

That on the — day of —— the Superior Court of the state of California, in the county of ———, by its order duly given and made, appointed said A B receiver of the property and assets of said corporation, and authorized and empowered him as such receiver, by suit or otherwise, to collect and receive all sums of money due or to become due to said corporation; and that thereafter, and on the — day of ——, said A B qualified as such receiver, and has been ever since such receiver;

VI.

That thereafter, and on the — day of ——, plaintiff, as such receiver, demanded of the defendant said sum of ——— dollars for said services, but the defendant refused and still refuses to pay the same or any part thereof.

WHEREFORE plaintiff demands judgment against defendant for said sum of ——— dollars, and plaintiff's costs of suit.

G H,
Attorney for Plaintiff.

FORM NO. 9.

COMPLAINT AGAINST A RECEIVER.

[*Name of Court.*]

A B, plaintiff, v. C D, as receiver, defendant.

Plaintiff complains of the defendant and alleges:

I.

That plaintiff was, on the — day of ——, and ever since has been, the owner of a sorrel horse branded on the right hip

with the letter A, then, and ever since of the value of ——— dollars;

II.

That on the — day of —— said horse came into the possession of E F and G H, who then were partners in business under the firm name of E F and Company, who unlawfully withheld the possession thereof from this plaintiff until the defendant C D took possession of said horse, and unlawfully withheld the possession thereof from plaintiff as hereinafter shown;

III.

That in an action which was pending in the Superior Court of the state of California, in the county of ———, between said E F as plaintiff, and said G H as defendant, for a dissolution of the partnership between them, for an accounting, and for the appointment of a receiver of their partnership property and effects, the defendant C D was, by the order of said Superior Court in the county of ———, duly given and made on the — day of ——, appointed receiver of the partnership property and effects of said firm of E F and Company, and the defendant C D afterwards, and on the — day of ——, qualified as such receiver, and as said receiver took possession of such partnership property and effects, and claiming to act as such receiver he took possession of said sorrel horse, the property of the plaintiff, which was then unlawfully withheld from plaintiff by said E F and G H, partners as aforesaid;

IV.

That thereafter, and on the — day of ——, while said sorrel horse was so in possession of said C D, who claimed to hold the same as such receiver, this plaintiff demanded possession of the same from the defendant, but the defendant refused to deliver the possession thereof to plaintiff, and has ever since withheld the possession thereof from plaintiff, to plaintiff's damage, ——— dollars;

V.

That on the — day of —— said Superior Court of the state of California in said county of ———, by its order duly given and made, granted to this plaintiff leave to bring this action against said C D, receiver as aforesaid, for the possession of said horse, or its value, and for damages.

WHEREFORE plaintiff demands judgment against defendant for the possession of said horse, or the sum of ——— dollars, its value, in case a delivery of possession cannot be had, and for ——— dollars damages and plaintiff's costs of suit.

I J,
Attorney for Plaintiff.

A receiver cannot be sued except by leave of the court appointing such receiver, and if an action be commenced against such receiver without first obtaining such consent, the person commencing the action may be adjudged to be guilty of contempt of court.
High on Receivers, 2nd, Ed., Sec. 254.

FORM NO. 10.

COMPLAINT BY A MINOR, AN INSANE OR INCOMPETENT PERSON SUING BY HIS GUARDIAN AD LITEM.

[*Name of Court.*]

A B, a minor [or an insane, or incompetent person,] by E F, his guardian ad litem, plaintiff, v. C D, defendant.

A B, who is a minor [or an insane, or an incompetent person] by E F, his guardian ad litem in this action, complains and alleges:

I.

That A B is a minor [or is an incompetent person, or is insane,] and by the order of this court duly given and made on the — day of —— said E F was appointed guardian ad litem of said A B to commence and prosecute this action, and said E F has accepted such appointment;

II

That on the — day of —— the plaintiff was the owner and in possession of a certain sorrel horse of the value of ——— dollars; and while he was so the owner and in the possession of said horse, the defendant took said horse from the possession of the plaintiff and converted it to his, the defendant's own use;

III.

The plaintiff has sustained damages by reason of the conversion of said property in the sum of ——— dollars, the value of said horse, and has sustained damages in the further sum of

——— dollars for the time and money which he has expended in the pursuit of said property.

WHEREFORE plaintiff demands judgment against the defendant for the sum of ——— dollars, his damages as aforesaid, and his costs of suit.

G H,
Attorney for Plaintiff.

The measure of damages for the conversion of property is stated in section 3336 of the Civil Code.

FORM NO. 11.

COMPLAINT BY HUSBAND AND WIFE.

[*Name of Court.*]

A B and C D, his wife, plaintiffs, v. E F, defendant.

Plaintiffs complain of the defendant and allege:

I.

That on the — day of ——, plaintiff, A B, intermarried with the plaintiff, C D, and she has been ever since his wife;

II.

That on the — day of ——, at the ——— in California, the defendant, in the presence and hearing of M N, and of a number of persons, maliciously spoke concerning the plaintiff C D, the false and defamatory words following: [Set out the words spoken as accurately as possible] whereby the plaintiff C D was injured in her reputation to her damage, ——— dollars.

WHEREFORE plaintiff demands judgment against defendant for the sum of ——— dollars, and plaintiff's costs of suit.

G H,
Attorney for Plaintiffs.

FORM NO. 12.

COMPLAINT BY PARTNERS IN BUSINESS.

[*Name of Court.*]

A B and C D, partners in business under the firm name of A B and Company, plaintiffs, v. E F, defendant.

Plaintiffs complain and allege:

I.

That at the times hereinafter mentioned plaintiffs were and they are partners doing business under the firm name of A B and Company;

II.

That on the — day of —— defendant made to plaintiffs, as partners as aforesaid, his negotiable promissory note in writing, of which the following is a copy: [Insert copy.]

III.

That plaintiffs have never endorsed, sold, assigned, or transferred said promissory note, and they are the owners and holders thereof, and the same is due and wholly unpaid.

WHEREFORE plaintiffs demand judgment against the defendant for the sum of [stating the amount of the principal of said note] and interest thereon from the — day of —— [the date of the note] at the rate of — per cent. per annum, and costs of suit.

G H,
Attorney for Plaintiffs.

FORM NO. 13.

COMPLAINT AGAINST PARTNERS ON THEIR CHECK.

[*Name of Court.*]

A B, plaintiff, v. C D and E F, partners in business under the firm name of C D and Company, defendants.

Plaintiff complains and alleges:

I.

That defendants were at all the times hereinafter mentioned, and are partners in business under the firm name of C D and Company;

II.

That on the — day of —— at ———, the defendants under their firm name of C D and Company, for a valuable consideration, received from plaintiff, made and delivered to the plaintiff, their check in writing drawn on the bank of ——— at ———,

for ——— dollars, of which check the following is a copy: [Insert copy.]

III.

That thereafter, and on the — day of ——, plaintiff presented said check at said bank for payment, but said bank refused to pay the same, and the same is wholly unpaid;

IV.

That on the — day of ——, the next business day, plaintiff gave notice to defendants of said refusal of said bank to pay said check, and of its dishonor by said bank, and that said check was wholly unpaid.

WHEREFORE plaintiff demands judgment against defendants for the sum of [stating the amount of check] and interest thereon from the — day of — [stating the time of the presentation of the check for payment] and plaintiff's costs of suit.

G H,
Attorney for Plaintiff.

FORM NO. 14.

COMPLAINT BY ONE CREDITOR, SUING ON BEHALF OF HIMSELF AND OTHERS.

[*Name of Court.*]

A B, plaintiff, v. C D, defendant.

Plaintiff complains on behalf of himself and all others, the creditors of C D who shall come in and seek relief by, and contribute to the expenses of this action, and alleges:

I.

[Set forth a cause of action in which all the creditors of C D have an interest.]

II.

That the said creditors of C D are very numerous, and are more than — in number, and that some of them are unknown to plaintiff, and cannot with diligence be ascertained by him, and

that it is impracticable for him to bring them all before the court in this action, and he sues for the benefit of all.

WHEREFORE [insert proper demand for judgment.]

G H,
Attorney for Plaintiff.

Section 382 of the Code of Civil Procedure, authorizes the commencement of an action of this kind.

FORM NO. 15.

COMPLAINT ON LOAN OF MONEY.

[*Name of Court.*]

A B, plaintiff, v. C D, defendant.

Plaintiff complains and alleges:

I.

That on the — day of ——, plaintiff loaned to the defendant the sum of ——— dollars, and the defendant in consideration thereof promised to repay the same to plaintiff on the — day of ——;

II.

That the same has not, nor has any part thereof, been repaid, and the whole thereof is due and unpaid.

WHEREFORE plaintiff demands judgment against defendant for the sum of [state the amount of money that was loaned] and interest thereon from the — day of ——, and plaintiff's costs of suit.

G H,
Attorney for Plaintiff.

FORM NO. 16.

COMPLAINT UPON A CHECK, ENDORSEE AGAINST DRAWER.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That on the — day of —— the defendant, for value, made his check in writing to E F, dated on that day and directed to the

bank of ———, a banking corporation in the ——— in the state of California. The following is a copy of said check: [Insert copy.]

II.

That thereafter the defendant, C F, for value, sold, endorsed and delivered the same to plaintiff, and plaintiff has ever since been the owner and holder thereof;

III.

That thereafter, and on the — day of —— plaintiff presented said check for payment to said bank of ———, and the same was not paid, and the payment thereof was refused;

IV.

That on the next business day after said check was so presented to said bank for payment, and the payment thereof was refused, plaintiff gave notice to the defendant of such presentation, refusal and non-payment, and that said check was wholly unpaid;

V.

That defendant has not paid said check, nor any part thereof, and the same is wholly unpaid.

WHEREFORE plaintiff demands judgment against the defendant for the sum of ——— dollars [the amount payable by the check] and interest thereon from the — day of ——, and plaintiff's costs of suit.

G H,
Attorney for Plaintiff.

If the check be made payable to a fictitious person and is negotiated by the drawer, an action against the drawer can be maintained thereon.
Stevens v. Strong 2 Sandford 138.
Willets v. Phoenix Bank, 2 Duer 121.

FORM NO. 17.

COMPLAINT AGAINST A BANK WHICH HAS ACCEPTED A CHECK AND AFTERWARDS REFUSED TO PAY IT.

[*Name of Court.*]

A B, plaintiff, v. C D, a corporation, defendant.

Plaintiff complains and alleges:

I.

That the defendant is a corporation organized and existing under the laws of the state of ———, and has its principal place of business at ———, and was such corporation at all of the times hereinafter mentioned;

II.

That on the — day of —— one E F made his check in writing bearing date on that day, and directed it to the defendant, and delivered the same to this plaintiff for value, of which check the following is a copy: [Insert copy.]

III.

That thereafter and on the — day of ——, the defendant in writing accepted said check and promised to pay the same;

IV.

That thereafter on the — day of ——, plaintiff presented said check to the defendant at its said place of business for payment, and the same was not paid, and said bank refused to pay the same, and it is wholly unpaid.

WHEREFORE plaintiff demands judgment against the defendant for the sum of ——— dollars [the amount of the check] and interest thereon from the — day of ——, and plaintiff's costs of suit.

G H,
Attorney for Plaintiff.

FORM NO. 18.

COMPLAINT FOR MONEY DUE ON AN ACCOUNT.

[*Name of Court.*]

Plaintiff complains of the defendant and alleges:

I.

That the defendant is indebted to plaintiff in the sum of ——— dollars upon the balance of an account for goods sold and delivered to the defendant by plaintiff between the — day of —— and the — day of ——;

II.

That said goods were sold and delivered on a credit of thirty days, and that such credit expired before this action, and said sum of ——— dollars, said balance of said account, is due and wholly unpaid.

WHEREFORE plaintiff demands judgment against the defendant for ——— dollars, and plaintiff's costs of suit.

G H,
Attorney for Plaintiff.

FORM NO. 19.

COMPLAINT ON AN ACCOUNT STATED.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That on the — day of ——, an account was stated between the plaintiff and the defendant, and upon such statement a balance of ——— dollars was found to be due from the defendant to plaintiff;

II.

That the defendant, in consideration thereof, promised to pay said sum of —— dollars to plaintiff on or before the — day of ——, but he has not paid the same, and the same is due and wholly unpaid.

WHEREFORE plaintiff demands judgment against defendant for ——— dollars, and interest thereon from the — day of ——, and plaintiff's costs of suit.

G H,
Attorney for Plaintiff.

FORM NO. 20.

COMPLAINT ON A BOND, CONDITIONED FOR THE PAYMENT OF MONEY.

[*Name of Court.*]

A B, plaintiff, v. C D, E F and I J, defendants.

Plaintiff complains and alleges:

I.

That on the — day of —— the defendants made and delivered to plaintiff, for value, their bond, of which the following is a copy: [Insert copy.]

II.

That the defendant C D has not paid the sum of ——— dollars, mentioned in the condition of said bond, and the same is due and wholly unpaid.

WHEREFORE plaintiff demands judgment for the sum of ——— dollars [insert the amount payable by the condition of the bond] and plaintiff's costs of suit.

G H,
Attorney for Plaintiff.

FORM NO. 21.

COMPLAINT ON A BOND FOR THE FIDELITY OF AN EMPLOYEE.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That on the — day of —— plaintiff was about to employ a clerk, and thereafter, and on the same day, the defendants, in consideration of the employment by plaintiff of E F as such clerk, made and delivered to plaintiff their bond, of which the following is a copy: [Insert copy.]

II.

That in consideration of the making and delivery of said bond, plaintiff on the — day of —— employed as such clerk E F in said bond mentioned, and he entered into the employment of plaintiff as such clerk;

III.

That while said E F was so in the employment of plaintiff as such clerk, and in the performance of the duties thereof, he received as such clerk between the — day of —— and the — day of ——, ——— dollars in money, and goods and merchandise of the value of ——— dollars, to the use of plaintiff;

IV.

That he never accounted to plaintiff for said money and property, or any part thereof, but he converted the same and the whole thereof to his own use, and has never paid to plaintiff said money, nor delivered to plaintiff said property so converted by him to his own use, or any part thereof, to plaintiff's damage ——— dollars.

WHEREFORE plaintiff demands judgment against defendants for the sum of ——— dollars, and plaintiff's costs of suit.

G H,
Attorney for Plaintiff.

FORM NO. 22.

COMPLAINT ON AN ADMINISTRATOR'S BOND.

[*Name of Court.*]

A B, plaintiff, v. C D, E F and I J, defendants.

Plaintiff complains and alleges:

I.

That on the — day of ——, the Superior Court of the state of California, in the county of ———, by its order duly given and made, granted to the defendant C D letters of administration on the estate of G H, who was then deceased, and required the defendant C D, before entering on the duties of his trust as such administrator, to execute to the state of California a bond in the sum of $———, with sufficient sureties, to be approved by a judge of said court;

II.

That thereafter, and in compliance with said order, said C D as principal, and said E F and I J, as sureties, executed a bond in writing, and E F and I J, said sureties, made each an affidavit thereto showing himself qualified to be a surety thereon; the following is a copy of said bond and affidavits: [Insert copy.]

III.

That thereafter said bond was approved in writing by the Hon. ——— judge of said court; and thereafter, and on the — day of ——, said bond, affidavits and approval were filed of rec-

ord, and were recorded in the office of the clerk of said court, and said bond remained thereafter and is in full force and effect; and by reason of such bond, letters of administration on the said estate of G H, deceased, were issued to said C D as such administrator of said estate, and he took an oath as such administrator, and he has been ever since such administrator;

IV.

That on the — day of —— said Superior Court, by its order duly given and made, distributed the estate of said G H, deceased, to the persons entitled thereto, and which order has not been appealed from, set aside, revoked or modified;

And in and by said order said court distributed out of the assets of said estate to the plaintiff the sum of ——— dollars, and directed said C D as the administrator of said estate of G H, deceased, to pay the same to plaintiff, and there was at the time of making said order, and has been ever since, sufficient money, assets of said estate in the hands of said defendant C D, as the administrator of said estate of G H, deceased, for the payment to plaintiff of said sum of ——— dollars; and plaintiff demanded after said order was made, from said C D, as the administrator of said estate, said money so distributed to plaintiff; but said C D has not paid the same nor any part thereof, and the whole thereof is unpaid.

WHEREFORE plaintiff demands judgment against the defendants for the sum of ——— dollars, and the interest thereon from the — day of ——, and plaintiff's costs of suit.

J K,
Attorney for Plaintiff.

FORM NO. 23.

COMPLAINT ON A FIRE POLICY BY THE INSURED.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That the defendant was during all the times mentioned in the complaint a corporation created and organized and existing under the laws of the state of ———, and is such corporation;

II.

That on the — day of ——, in consideration of the payment by the plaintiff of the premium of ——— dollars, the defendant made its policy of insurance in writing to plaintiff, a copy of which is annexed to this complaint, marked exhibit "A," and is made a part of this complaint;

III.

That at the time of making said policy the plaintiff had an interest in the property insured, as the owner [or mortgagee] thereof, to an amount exceeding the sum of ——— dollars, and such interest existed when said property was destroyed by fire, as hereinafter stated;

IV.

That on the — day of —— said [state the property which was insured against fire] was [or were] totally destroyed [or were damaged and in part destroyed] by fire, to the loss of plaintiff in the sum of ———dollars, and said fire did not happen by either or any of the following causes named in said policy, namely: [State the causes excepted in the policy.].

V.

That the plaintiff has duly performed all the conditions of said policy of insurance on his part, and on the — day of —— gave to the defendant notice and proof of said fire and loss, and demanded from defendant payment of said sum of ——— dollars, the amount of said loss;

If there be a provision in the policy as to arbitration, plaintiff should allege facts showing that by reason of no fault or neglect on his part, no arbitration was had.

VI.

That the defendant has not paid said sum of ——— dollars, the amount of said loss, nor any part thereof, and the whole thereof is unpaid.

WHEREFORE plaintiff demands judgment against defendant for the sum of ——— dollars, and interest thereon from the — day of ——, and plaintiff's costs of suit.

G H,
Attorney for Plaintiff.

FORM NO. 24.

COMPLAINT ON INSURANCE ON LIFE.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That the defendant was at all of the times in this complaint mentioned, and is a corporation created, organized and existing under the laws of the state of ———;

II.

That on the — day of ——, in consideration of the payment by one M N to the defendant, of the premium of ——— dollars, the defendant made its policy of insurance in writing to said M N, a copy of which policy is hereto annexed, marked exhibit "A," and is made a part of this complaint;

III.

That said M N duly performed all the conditions of said policy on his part;

IV.

That on the — day of ——, at ———, in the state of ———, said M N died, which death was not caused by either or any of the following causes: [State the causes excepted in the policy.]

That said M N left a will in which plaintiff was named as sole executor, and after his death, and on the — day of ——, said will was admitted to probate by the order and decree of the Superior Court of the state of California in the county of ———, duly given and made, and said court by its order duly given and made, appointed plaintiff the executor of said will, and granted to him letters testamentary thereon, and he qualified as such executor; and thereafter and on the — day of —— letters testamentary were issued to him as such executor, and he has been such executor ever since;

V.

That on the — day of —— notice and proof were given to the defendant of the death of said M N, and the cause of such death and plaintiff, before this action, gave proof to defendant that plaintiff was the executor of the will of said decedent, and demanded from the defendant on the — day of —— said sum of

——— dollars, the amount of said insurance money, but the defendant has not paid the same nor any part thereof, and the whole thereof is due and unpaid.

WHEREFORE plaintiff demands judgment against defendant for said sum of ——— dollars, and interest thereon from said — day of ——, and plaintiff's costs of suit.

G H,
Attorney for Plaintiff.

FORM NO. 25.

COMPLAINT ON A VALUED POLICY ON SHIP.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That the defendant was at all the times hereinafter mentioned, and is a corporation created, organized and existing under the laws of the state of ———;

II.

That on the — day of —— in consideration of the premium of ——— dollars paid to the defendant by the plaintiff, the defendant made to the plaintiff a policy of insurance in writing, of which the following is a copy: [Insert copy.]

III.

That said ship was then lying at the port of ——— for a voyage from said port to ——— in ———;

IV.

That on the — day of —— the said ship sailed from said port of ——— on the voyage described in said policy, and while proceeding thereon was by the perils of the sea wrecked and totally lost; [or was burned and totally destroyed]

V.

That the plaintiff was at the time of the risk, and thereafter, until said loss, the owner of said ship, and was interested therein to an amount exceeding ——— dollars, namely: in the sum of ——— dollars, which was the value of said ship;

VI.

That plaintiff duly performed all of the conditions of said policy on his part, and after said loss and destruction of said ship he gave, on the — day of —— to the defendant, notice and proof of said loss and destruction, and demanded of defendant said sum of ——— dollars, the amount of said insurance money; but the defendant has not paid said money, nor any part thereof, and the whole thereof is unpaid.

WHEREFORE plaintiff demands judgment against defendant for said sum of ——— dollars, and interest thereon from the — day of ——, and plaintiff's costs of suit.

G H,
Attorney for Plaintiff.

FORM NO. 26.

COMPLAINT ON OPEN MARINE POLICY.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That at all the times hereinafter mentioned the defendant was and now is a corporation created, organized and existing under the laws of ———;

II.

That on the — day of ——, in consideration of the premium of ——— dollars paid to it by the plaintiff, the defendant made to plaintiff a policy of insurance in writing, of which the following is a copy: [Insert copy.]

III.

That the ship on which said insured property was laden [or was about to be laden] was then lying at the port of ——— for a voyage from said port to ——— in ———;

IV.

That plaintiff was at the time of the commencement of the risk, and at the time of the loss hereinafter mentioned, the owner of, and interested in said insured property to an amount exceeding ——— dollars, and the value of said insured property which

was laden on said ship was, when laden and until said loss, ——— dollars;

V.

That on the — day of —— the said ship sailed from said ——— on the voyage described in the policy, and while proceeding thereon, all of said insured property so laden on said ship was destroyed by the perils of the sea, to the loss of plaintiff of ——— dollars;

VI.

That plaintiff duly performed all of the conditions of said policy on his part, and on the — day of —— he gave to defendant notice and proof of said loss, and demanded of the defendant the sum of ——— dollars, the amount of said insurance money, but the defendant has not paid the same, nor any part thereof, and the whole thereof is unpaid.

WHEREFORE plaintiff demands judgment against defendant for the sum of ——— dollars, and interest thereon from the — day of ——, and plaintiff's costs of suit.

G H,
Attorney for Plaintiff.

FORM NO. 27.

COMPLAINT BY LESSOR AGAINST ASSIGNEE OF LESSEE.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That on the — day of —— plaintiff was the owner and possessed of the following described real estate, [describing it] and on said — day of ——, and while plaintiff was so the owner and possessed of said real estate, a lease in writing thereof was made between plaintiff and one M N, of which lease the following is a copy: [Insert copy.]

II.

That by virtue of and under said lease the said M N entered into the possession of said demised property, and was possessed thereof as such lessee;

III.

That thereafter, and on the — day of ——, and while possessed of said demised property under said lease, said M N assigned to the defendant by an instrument in writing, said lease, and the estate and interest of M N in said leased property, and said defendant thereupon entered into the demised premises and became possessed thereof under said lease and assignment, and he continued so possessed from thence hitherto; [or until, stating the time when defendant quit possession.]

IV.

That for the time defendant was so possessed of said demised premises, no rent for said demised premises has been paid, and the sum of ——— dollars was and is payable to plaintiff from defendant, as rent for said demised premises for said time, and plaintiff, on the — day of —— demanded from the defendant the said sum of ——— dollars, the amount of such rent; but the defendant has not paid the same, nor any part thereof, and the whole thereof is due and unpaid.

WHEREFORE plaintiff demands judgment against defendant for said sum of ——— dollars, and interest thereon from the — day of ——, and plaintiff's costs of suit.

G H,
Attorney for Plaintiff.

FORM NO. 28.

COMPLAINT ON NOTE, ESTIMATED IN MONEY, BUT PAYABLE IN CHATTELS.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That on the — day of —— defendant, for value, made to plaintiff the promissory note in writing of defendant, of which the following is a copy: [Insert copy.]

II.

That plaintiff on the — day of —— [state a time after the chattels were payable] demanded said chattels mentioned in said

promissory note from defendant, but the defendant did not pay nor deliver to plaintiff said chattels, nor any part thereof, nor said sum of ——— dollars, nor any part thereof; but the same is wholly undelivered and unpaid.

WHEREFORE plaintiff demands judgment against defendant for ——— dollars, and interest thereon from the — day of ——, and plaintiff's costs of suit.

G H,
Attorney for Plaintiff.

FORM NO. 29.

COMPLAINT ON A SUBSCRIPTION.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That plaintiff was on the — day of ——, and ever since has been a corporation created, organized and existing under the laws of the state of ———;

II.

That the plaintiff in the month of —— was proposing and contemplating the erection of a building for the purpose of an academy;

III.

That the defendant and others were desirous that plaintiff should erect and complete said building, and they requested plaintiff to erect and complete the same, and for the purpose of enabling plaintiff to do so, the defendant and others made to plaintiff their agreement and subscription in writing, whereby the defendant, and each of said other subscribers promised to pay to plaintiff the sum of money in said subscription paper set opposite to his name, and the defendant in consideration of the premises, and of the subscription by said other subscribers, promised to pay to plaintiff the sum of ——— dollars when said proposed building was erected by plaintiff. The following is a copy of said subscription paper, namely: [Insert copy.]

IV.

That upon the faith of said subscription plaintiff erected

and completed said building, and expended thereon large sums of money, and incurred large liabilities, and plaintiff duly performed all of the conditions of said subscription on its part;

V.

That after the erection and completion of said building, and on the — day of ——, plaintiff demanded from the defendant the said sum of ——— dollars, the amount of his said subscription, but the defendant has not paid the same, nor any part thereof, and the whole thereof is unpaid.

WHEREFORE plaintiff demands judgment against defendant for the sum of ——— dollars, and interest thereon from the — day of ——, and plaintiff's costs of suit.

G H,
Attorney for Plaintiff.

FORM NO. 30.

COMPLAINT BY EMPLOYEE PREVENTED FROM FULFILLING CONTRACT OF EMPLOYMENT.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That on the — day of —— plaintiff and defendant made a contract in writing, of which the following is a copy: [Insert copy. If the contract was not in writing, state the legal effect thereof.]

II.

That plaintiff entered upon his employment under said contract and duly performed all the conditions thereof on his part until the defendant refused, as hereinafter mentioned, to allow him to do so any longer; and plaintiff has always been, and is ready and willing, and offered to perform all the conditions of said contract on his part;

III.

That the defendant, on the — day of —— refused, and has ever since refused to allow plaintiff to perform the duties and conditions on his part of said contract of employment, and

refuses to pay him therefor, to plaintiff's damage in the sum of ——— dollars.

WHEREFORE plaintiff demands judgment against defendant for the sum of ——— dollars, and plaintiff's costs of suit.

G H,
Attorney for Plaintiff.

FORM NO. 31.

COMPLAINT BY EMPLOYER.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That on the — day of —— plaintiff and defendant made a contract in writing, of which the following is a copy: [Insert copy. If the contract was not in writing, state the legal effect thereof.]

II.

That to procure plaintiff to make such contract of employment with defendant, the defendant stated to plaintiff that defendant was a skilled and careful engineer, and knew how to run a stationary steam engine owned by plaintiff, which was of the value of ——— dollars; and confiding in the truth of such representations, plaintiff entered into said contract of employment with defendant, and entrusted to him the running of said steam engine of plaintiff;

III.

That the defendant was not a skilled or careful engineer, and he run said stationary engine of defendant, while he was in the employment of defendant, under said contract, so unskillfully and carelessly that said steam engine of plaintiff was injured, to plaintiff's damage, ——— dollars.

WHEREFORE plaintiff demands judgment against defendant for ——— dollars, and plaintiff's costs of suit.

G H,
Attorney for Plaintiff.

FORM NO. 32.

COMPLAINT AGAINST A PHYSICIAN AND SURGEON.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That at all the times hereinafter mentioned the defendant was a physician and surgeon;

II.

That plaintiff in the month of ——— employed the defendant as physician and surgeon, for a reasonable compensation to be paid by plaintiff, to set and heal the leg of the plaintiff which had been broken, and the defendant accepted such employment;

III.

That the defendant so negligently and unskillfully conducted himself in setting and attempting to heal said leg, that by reason of such negligence and want of skill, inflammation was brought on, which made it necessary to have said leg of plaintiff amputated, and it was amputated;

IV.

That by reason of the defendant's said negligence and unskillfulness plaintiff was made sick, and suffered great pain, and was kept from attending to his business for ——— months and was put to great expense, and has been, and still is, and will always be disabled from attending to his business as he otherwise would have done, to the damage of the plaintiff in the sum of ——— dollars.

WHEREFORE plaintiff demands judgment against defendant for ——— dollars, and plaintiff's costs of suit.

G H,
Attorney for Plaintiff.

FORM NO. 38.

COMPLAINT OF MORTGAGEE AGAINST MORTGAGOR AND OTHERS FOR FORECLOSURE AND SALE.

[*Name of Court.*]

A B, plaintiff, v. C D, E F, I J, and John Doe and Richard Roe, defendants.

Plaintiff complains and alleges:

I.

That on the — day of —— defendant C D made to plaintiff a promissory note in writing of which the following is a copy: [Insert copy.]

II.

That on the same day, and to secure to plaintiff the payment of said promissory note, according to the tenor and effect thereof, the defendant C D made, acknowledged and delivered to plaintiff a mortgage, with a certificate of acknowledgment thereon, of which mortgage, and of the certificate of such acknowledgment, and of the certificate of the recording thereof, the following are copies: [Insert copies.]

III.

That said mortgage was so acknowledged by the defendant before ——— Esq., a notary public of said county of ——— who wrote his certificate of such acknowledgment thereon, and such mortgage, and said certificate of acknowledgment thereon was recorded in the office of the county recorder of said county of ———, California, the county in which the land described in said mortgage is situate, on the — day of —— in book —— of mortgages, volume ——, pages —— at —— o'clock —m. of that day;

IV.

That plaintiff has employed G H, an attorney at law, as plaintiff's attorney in this action, and has agreed to pay him a reasonable compensation for his services as such attorney, and that the sum of ——— dollars is a reasonable fee and compensation for such services; that the defendant has not insured the buildings on said mortgaged property and assigned the policy of such insurance to plaintiff; and the plaintiff did for his better security, and as provided for in said mortgage, on the

— day of ——, pay the sum of ——— dollars for the insuring of the buildings on said mortgaged property, and they were by reason thereof insured; and plaintiff did, on the — day of —— pay the further sum of ——— dollars for the searching of the title to said real estate, subsequent to the making of said mortgage, and the sums so paid by plaintiff are reasonable, and the same are wholly unpaid by the defendant C D;

V.

That plaintiff is ignorant of the names of two of the defendants in the action, and he has designated such defendants in the complaint in the action by the names John Doe and Richard Roe; and he asks that when the true names of such defendants are discovered, the complaint may be amended accordingly.

VI.

That each of the defendants, E F, I J, John Doe and Richard Roe, has, or claims to have some title to, interest in or lien upon said mortgaged premises, but such title, interest or lien if any, is subsequent to and is subject to said mortgage of plaintiff thereon;

VII.

That said promissory note is wholly unpaid, [or the sum of ——— dollars was on the — day of —— paid on the interest due on said promissory note, but no other payment has been made thereon.]

WHEREFORE plaintiff demands judgment, that plaintiff recover from the defendant C D, judgment for the sum of ——— dollars, and the interest thereon at the rate of ——— per cent. per annum, from the — day of ——, the amount due and unpaid on said promissory note, and for ——— dollars paid by plaintiff for the insurance of the buildings on said mortgaged premises, and the interest thereon at the rate of ——— per cent. per annum from the — day of ——, and for ———dollars paid for the searching of the records of said real estate, and for the sum of ——— dollars, the reasonable fee of the attorneys of plaintiff in this action, and plaintiff's costs in the action:

And that all of said sums of money be adjudged to be a lien on said mortgaged premises; that the title to, interest in, or

lien upon said mortgaged premises, if any, of each of said defendants, E F, I J, John Doe and Richard Roe, be adjudged to be subsequent to plaintiff's said mortgage, and subject thereto;

That said mortgaged premises, or so much thereof as may be necessary for that purpose, be adjudged to be sold to pay such judgment against the defendant C D, and the costs and expenses of sale, in the manner provided by law, by the sheriff of ——— county, or by a commissioner appointed for that purpose; and that such sheriff or commissioner in his return or report of the sale, return or report the balance of such judgment, if any, that the proceeds of such sale are insufficient to satisfy, and that judgment be docketed against the defendant C D for such deficiency and that plaintiff have execution against the property of said C D therefor;

That either of the parties to this action may be a purchaser or purchasers at such sale; that such purchaser, on receiving a deed of conveyance from such sheriff or commissioner, in the manner provided by law, for the mortgaged premises, or for so much thereof as may be sold to him, be let into the possession of the land so purchased, and for such other or further relief as the equity of the case may warrant.

G H,
Attorney for Plaintiff.

If the fee of plaintiff's attorney and expenses of search be not a lien by the mortgage on the mortgaged premises, then the form of the complaint and the decrees (forms 38, 211, 223 and 224) should be so changed as to be in accordance with the facts, since unless the same are a lien on the mortgaged premises the plaintiff can recover only a personal judgment against the mortgagor therefor.

A lis pendens should be filed in the office of the county recorder of the proper county at the time of the commencement of the action, and may be as follows:

FORM NO. 39.

NOTICE OF PENDENCY OF ACTION.

[*Name of Court.*]

Notice is hereby given that this action is pending in the Superior Court of the state of California in the county of ———; that A B is the plaintiff in the action, and C D, E F, I J, and the two defendants designated in the action by the

names John Doe and Richard Roe, are the defendants in the action, and the object of the action is to obtain a judgment of the court for the sale of the following described real property, [describe it] which was mortgaged by the defendant C D, to the plaintiff to secure the payment of an indebtedness from said C D, to the plaintiff, to foreclose all equity of redemption in said mortgaged property by the defendants in the action, or by any, or either of them, for a deficiency judgment, if there be a deficiency, against the defendant C D, and for such other or further relief as the equity of the case may warrant.
[*Date.*]

G H,
Attorney for Plaintiff.

FORM NO. 40.

COMPLAINT AGAINST A BAILEE OF GOODS FOR NOT TAKING CARE OF AND RETURNING THEM.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That on the — day of ——, and at ——— plaintiff delivered to the defendant, and defendant received from plaintiff goods and chattels described as [describing them] then and ever since the property of plaintiff, of the value of ——— dollars, to be by the defendant safely and securely kept for the plaintiff, and returned and delivered to him on demand, for the compensation of ——— dollars to be paid to the defendant by plaintiff for such keeping, return and delivery;

II.

That plaintiff duly performed all the conditions of said contract on his part, and on the — day of —— he offered to pay, and tendered to defendant said sum of ——— dollars, and demanded of him the return of said goods and chattels, and plaintiff was then, and has been ever since ready, able and willing, and he offered to pay to defendant, and tendered to defendant, said sum of ——— dollars to be paid on the return to plaintiff of said goods and chattels, but the defendant neglected

and refused, and ever since has neglected and refused to return said goods and chattels or any part thereof to plaintiff;

[That the defendant so negligently and carelessly conducted himself with respect to said goods, and took so little care thereof, that by and through the carelessness and negligence of defendant and his servants said goods were injured and were lost to plaintiff] to plaintiff's damage ——— dollars.

WHEREFORE plaintiff demands judgment against defendant for ——— dollars, and plaintiff's costs of this action.

G H,
Attorney for Plaintiff.

FORM NO. 41.

AGAINST A COMMON CARRIER FOR INJURY TO PERSON AND PROPERTY.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That at the times hereinafter mentioned defendant was a common carrier of passengers [and goods] from ——— to ——— for hire;

II.

That on the — day of ———, and while such common carrier, defendant received plaintiff, [and trunks of plaintiff which contained goods, the property of plaintiff, of the value of ——— dollars] to be carried by defendant as such common carrier from ——— to ———;

III.

That the defendant and his servants were negligent and careless in carrying plaintiff [and said goods] from ——— to ———, and by reason of such negligence and carelessness, the [state the nature of the accident;] and that by reason thereof plaintiff was bruised, wounded and injured so that thereby he became ill and lame, and was prevented for ——— months from attending to his business [and for a long time to come will be so prevented] and he necessarily incurred expenses to the amount of ——— dollars, in endeavoring to be cured of the injuries so received, to plaintiff's damage ——— dollars;

IV.

[That by reason of the negligence and carelessness of the defendant and his servants said trunks and their contents were wholly lost or were greatly injured to the further damage of plaintiff, ——— dollars.]

WHEREFORE plaintiff demands judgment against defendant for ——— dollars, and plaintiff's costs of this action.

G H,
Attorney for Plaintiff.

FORM NO. 42.

AGAINST AN INNKEEPER.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That at the times hereinafter mentioned the defendant was the keeper of an inn in ———, known as "———;"

II.

That on the — day of —— plaintiff was received in said inn by defendant as a traveller and guest, together with the baggage of plaintiff, consisting of a trunk containing, [describe the articles contained in said trunk] of the value of ——— dollars;

III.

That the defendant and his servants conducted themselves so negligently and carelessly in regard to the same that while plaintiff remained at said inn as such traveller and guest his said trunk and its said contents were taken away from the room in said inn occupied by plaintiff as such guest by some person or persons to plaintiff unknown, and thereby the same became wholly lost to the plaintiff, to his damage ——— dollars.

WHEREFORE plaintiff demands judgment against defendant for ——— dollars, and plaintiff's costs of this action.

G H,
Attorney for Plaintiff.

FORM NO. 43.

AGAINST A SHERIFF FOR NEGLECTING TO LEVY ON PROPERTY.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That at all the times hereinafter mentioned, the defendant was the sheriff of ——— county, in this state;

II.

That on the — day of ———, in an action in the Superior Court of the state of California, in the county of ———, wherein this plaintiff was plaintiff and one C D was defendant plaintiff recovered judgment, which was duly given and made, against said C D for ——— dollars, which judgment was thereafter and on the — day of ——— entered and docketed by the clerk of said court;

III.

That on the — day of —— an execution against the property of C D was issued to enforce said judgment, and was delivered to the defendant as the sheriff of said county of ——— [state the legal effect of such execution as in form 158.]

IV.

That at the time of said delivery of said execution to the defendant as sheriff as aforesaid, there was within said county of ——— property belonging to said C D, not exempt from execution, namely, [describe such property] out of which the defendant might have satisfied said judgment, and of which property the defendant then and there had notice, and since such notice, said C D has sold said property, and he is insolvent, nevertheless the defendant, in violation of his duty as such sheriff, failed to levy on said property, or any part thereof, as by said execution he was required to do, and he has returned said execution wholly unsatisfied and said judgment against C D is wholly unpaid and unsatisfied to the damage of plaintiff ——— dollars.

WHEREFORE plaintiff demands judgment against defendant for ———dollars, and plaintiff's costs of suit.

G H,
Attorney for Plaintiff.

FORM NO. 44.

AGAINST A VENDOR FOR DECEIT ON SALE OF LAND.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That plaintiff on the — day of ——— made a contract in writing with defendant to buy of him a tract of land owned by the said defendant, situate in ——— and described as [describe the land] which said tract of land the defendant, with intent to deceive and defraud the plaintiff, and to induce him to enter into said contract for the purchase of said tract of land, falsely represented to plaintiff that said tract of land contained ——— acres, when the defendant then well knew that it contained, and it did contain only —— acres; and the plaintiff, confiding in the truth of said representations, and deceived by said representations, and supposing and believing that said tract of land did contain said quantity of —— acres, entered into said contract with the defendant to purchase from him said tract of land, and to pay him therefor the sum of ——— dollars, and did under said contract pay to defendant said sum of ——— dollars for said tract of land.

II.

That in fact said tract of land did not contain ——— acres, but it contained only ——— acres; whereby and by reason of the premises plaintiff has sustained damage in the sum of ——— dollars.

WHEREFORE plaintiff demands judgment against defendant for ——— dollars, and plaintiff's costs of suit.

G H,
Attorney for Plaintiff.

FORM NO. 45.

AGAINST THE KEEPER OF A VICIOUS DOG FOR PERSONAL INJURIES INFLICTED BY THE DOG.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That at the times hereinafter mentioned defendant kept a

ferocious and mischievous dog, accustomed to attack and injure mankind; and defendant well knew said dog to be ferocious and mischievous, and accustomed to attack and injure mankind.

II.

That the defendant while he kept said dog, as aforesaid, negligently suffered such dog to go at large without being securely guarded or confined.

III.

That on the — day of —— said dog, while in the keeping of the defendant, and while at large and not securely guarded or confined, attacked and bit and wounded plaintiff in the leg, [and state other injuries if any] whereby this plaintiff became lame and sore, and suffered great pain, and was prevented from going on with his business, as he otherwise would have done; and was obliged to and did expend ——— dollars in endeavoring to be cured of said wounds and injuries, to plaintiff's damage, ——— dollars.

WHEREFORE plaintiff demands judgment for ——— dollars, and plaintiff's costs of suit.

G H,
Attorney for Plaintiff.

FORM NO. 46.

AGAINST A RAILROAD COMPANY FOR DAMAGE TO PERSON AND PROPERTY.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That at the times hereinafter mentioned the defendant was and is a corporation organized under the laws of the state of ———, and was the owner of [or was in the possession of] a certain railroad known as ——— railroad, and of the track, cars, locomotives, and other appurtenances thereto belonging, and was using the same for the transportation of goods and passengers, for hire;

II.

That on the — day of ——, while the plaintiff was trav-

elling in a wagon and two horses, the property of plaintiff, and of the value of ——— dollars, along a public highway known as [give name of highway] in the county of ———, in this state, leading from ——— to ———, and which crossed the track of said railroad at, [describe where said crossing was] and as the plaintiff had reached said crossing, the defendant carelessly and negligently caused one of its locomotives, with a train of cars thereto attached, to approach said crossing, and then and there to pass rapidly over the track of said railroad at said crossing, and negligently and carelessly omitted, while so approaching said crossing, to give any signal by ringing the bell or sounding the steam whistle, or otherwise, by reason whereof the plaintiff was unaware of the approach of said locomotive, and train of cars;

III.

That trees [or a building] were near said track on the side thereof on which the plaintiff and said locomotive and train of cars were approaching, which prevented plaintiff from seeing said locomotive and train of cars until too late for plaintiff to avoid the collision hereinafter mentioned; and that by reason of said negligence and carelessness of the defendant, and of its servants and employees, and without any carelessness or negligence on the part of the plaintiff the said locomotive struck the plaintiff's horses and severely injured them, and injured said wagon, so that said horses and wagon were worthless, and also thereby caused the plaintiff to be thrown out of said wagon and upon the ground, with such force as to fracture his arm and otherwise to injure him by [state the injuries sustained;] and that thereby plaintiff has been deprived of the use of said wagon and horses, and was caused great pain and suffering, and has been put to the expense of ——— dollars in endeavoring to be cured of said injuries; and was and still is prevented from going on with his business as he otherwise would have done; and he is, as he believes, permanently injured so that he will never be as strong, or able to carry on said business, or any business, as efficiently as before, to his damage, ——— dollars.

WHEREFORE plaintiff demands judgment against defendant for ——— dollars, and plaintiff's costs of suit.

G H,
Attorney for Plaintiff.

FORM NO. 47.

COMPLAINT AGAINST A RAILROAD COMPANY BY AN EMPLOYEE FOR INJURIES BY REASON OF DEFECTIVE MACHINERY.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That at the times hereinafter mentioned the defendant was, and it is, a corporation organized under the laws of the state of ———, and was the owner of [or was in the possession of] a certain railroad known as ——— railroad, and of the tracks, cars, locomotives, trains of cars, and other appurtenances thereto belonging, and was using the same for the transportation of goods and passengers for hire;

II.

That the plaintiff, on the — day of ———, at the time of the grievances hereinafter mentioned, was in the employment of the defendant as fireman upon a locomotive engine, so used, and which was driven by steam power;

III.

That said steam locomotive was defective and insecure, and the boiler thereof was defective, unsafe and dangerous, but of such defects plaintiff had no knowledge, information, or notice;

And that by reason of said defects, and by reason of the failure, by the carelessness and neglect of the defendant to furnish a safe and secure steam locomotive to be used by the plaintiff in his said employment, and while the plaintiff was on said steam engine so used by the plaintiff in the performance of his duties as such fireman, under said employment, the boiler connected with the engine of said locomotive, by reason of the unsafeness, defectiveness and insecurity thereof, exploded, whereby large quantities of steam and water escaped therefrom;

and by reason thereof the plaintiff, without fault or negligence on his part, was severely scalded and injured:

And that by reason thereof plaintiff became, and for a long time remained ill, and was obliged to and did expend the sum of ——— dollars in endeavoring to be cured from said injuries; that said injuries are permanent, and hitherto, since receiving the same, plaintiff has been prevented thereby, and will hereafter be prevented thereby from pursuing his business, to his damage ——— dollars.

WHEREFORE plaintiff demands judgment against defendant for ——— dollars, and plaintiff's costs of suit.

G H,
Attorney for Plaintiff.

FORM NO. 48.

COMPLAINT AGAINST A DEFENDANT WHO HAS OBTAINED POSSESSION OF GOODS BY FRAUD.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That on the — day of —— the defendant, with intent to deceive and defraud plaintiff by inducing plaintiff to sell goods to him on credit, falsely represented to plaintiff that the defendant was solvent, and worth ——— dollars over all his liabilities;

II.

That the plaintiff, relying on said representations, was thereby induced to sell on credit, and deliver to the defendant, [briefly designating the goods so sold and delivered] of the value of ——— dollars, and which goods were so sold to the defendant for that sum;

III.

That said representations were false in that [stating wherein they were false] and were then known by the defendant to be false;

IV.

That the price for which said goods were sold to the defendant has not been paid, and no part thereof has been

paid, and the defendant, having so obtained the possession of said goods, converted and disposed of them to his own use to the damage of the plaintiff, ——— dollars.

WHEREFORE plaintiff demands judgment against defendant for ——— dollars and plaintiff's costs of suit.

G H,
Attorney for Plaintiff.

FORM NO. 49.

AGAINST DEFENDANT FOR MALICIOUS INJURY.

[*Name of Court.*]

Plaintiff complains and alleges:

That on the — day of ——, at ———, the defendant wilfully and maliciously intending to injure the plaintiff, cut, broke, mutilated and defaced goods, namely: [describe the goods] the property of the plaintiff, of the value before so injured of ——— dollars, and thereby greatly injured the same so that they became and were of no greater value than ——— dollars, to plaintiff's damage ——— dollars.

WHEREFORE plaintiff demands judgment against defendant for ——— dollars, and plaintiff's costs of suit.

G H,
Attorney for Plaintiff.

FORM NO. 50.

COMPLAINT AGAINST DEFENDANT FOR CHASING PLAINTIFF'S CATTLE.

[*Name of Court.*]

Plaintiff complains and alleges:

That on the — day of ——— at ———, the defendant chased and drove about twenty of the cattle of plaintiff, of the value of ——— dollars; thereby they were greatly injured and bruised, and the value thereof was greatly decreased, to the damage of plaintiff of ——— dollars.

WHEREFORE plaintiff demands judgment against defendant for ——— dollars, and plaintiff's costs of suit.

G H,
Attorney for Plaintiff.

FORM NO. 51.

COMPLAINT AGAINST DEFENDANT FOR TRESPASS ON LAND.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That on the —, day of ——plaintiff was the owner and possessed of land situate in the county of ———, in this state, described as: [describing the land.]

II.

That while plaintiff was so the owner and possessed of said tract of land the defendant, on said — day of —— broke into and entered with his cattle on said land, and caused the same to be depastured, and the grass, growing grain and feed thereon to be trod down and injured by his said cattle, to plaintiff's damage, ——— dollars.

WHEREFORE plaintiff demands judgment against defendant for ——— dollars and plaintiff's costs of suit.

G H,
Attorney for Plaintiff.

FORM NO. 52.

COMPLAINT AGAINST A DEFENDANT FOR DIVERTING WATER FROM PLAINTIFF'S MILL.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That prior to the grievances hereinafter mentioned a stream of water called ———, flowed in its natural and usual course from ——— to ——— without the hindrance of defendant or of any other person.

II.

That on the —day of —— plaintiff was, and ever since has been the owner, and possessed of a grist mill erected near said stream of water in the county of ——— in this state, on a tract of land owned by plaintiff described as [describe the land] between said ——— and said ———, [describe said points from which and to which said stream of water flowed in its natural course.]

III.

That while plaintiff was so the owner and in possession of said mill, and until the grievances hereinafter mentioned, said mill was propelled and driven by water power furnished by the waters of said stream; and the water power so furnished by the waters of said stream was sufficient to propel and drive the machinery of said mill; and the daily net profits to plaintiff from said mill were, until said grievances, ——— dollars;

IV.

That on the — day of ——, the defendant, well knowing the premises, and intending to injure the plaintiff, built a dam across said stream above said mill, and diverted thereby and has ever since diverted thereby the waters of said stream from the natural channel of said stream, and prevented said waters of said stream from flowing near said mill; and thereby he has destroyed the use by plaintiff of the waters of said stream for water power for his said mill;

V.

That by reason of said acts of the defendant the plaintiff has sustained injury and will sustain injury from the loss of the profits which he would otherwise have made from the use of said mill to his damage in the sum of ——— dollars per day each and every day from said — day of ——, and said mill has been made valueless to plaintiff.

WHEREFORE plaintiff prays judgment against defendant that said dam be abated; that the defendant be enjoined from diverting the waters of said stream from plaintiff's said mill, and that plaintiff recover from the defendant ——— dollars and plaintiff's costs of this action.

G H,
Attorney for Plaintiff.

FORM NO. 53.

COMPLAINT AGAINST DEFENDANT FOR ERECTING AND MAINTAINING A SLAUGHTER HOUSE.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That the plaintiff is, and at the times hereinafter mentioned was, and ever since has been, possessed of a lot of land situate in the county of ———, in this state, known as lot No.——— in block No. ———, in the city of ———; and he had and has a dwelling house thereon which he inhabited during said times, and now inhabits with his family;

II.

That defendant was during said times possessed of land described as [describe the land] in the immediate vicinity of the said lot and house of plaintiff;

III.

That the defendant, in the month of [state also the year] and while plaintiff and his family inhabited said dwelling house on said lot of plaintiff, erected and he maintains on said land of the defendant, a slaughter house and cattle pens and hog pens in which he kept and keeps cattle and hogs, and he has slaughtered and he slaughters cattle and hogs in said slaughter house, and he, by said acts causes noxious and offensive smells which taint and corrupt the atmosphere so as to render said dwelling house and premises of plaintiff unfit for habitation;

IV.

That by reason of said offensive smells, and such tainting and corrupting of the atmosphere, the plaintiff, [and his wife and two of his children,] has [or have,] become ill, and plaintiff has necessarily expended, and has become liable for the payment of large sums of money in endeavoring to be cured, [and to have them cured,] and by said acts of defendant plaintiff has sustained injury to his damage, ——— dollars.

WHEREFORE plaintiff demands judgment that said slaughter house and cattle and hog pens be abated; and that the defendant be enjoined from further maintaining them; and that plain-

tiff have and recover from defendant ——— dollars, and the plaintiff's costs of this action.

G H,
Attorney for Plaintiff.

FORM NO. 54.

COMPLAINT AGAINST A DEFENDANT FOR OBSTRUCTING A WAY TO PLAINTIFF'S PROPERTY.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That plaintiff, at the times hereinafter mentioned was and he is possessed of real estate, situate in the county of ———, in this state, described as: [describe the property.] and he owned and owns a way thereto and therefrom over the adjoining land, which adjoining land during said times was and is owned by the defendant, which way was and is from and to a public highway, and to pass and repass freely at all times thereon with his family and employees and others, with horses, cattle, carts, wagons and other personal property, and which way is described as: [describe the way.]

II.

That the defendant, on the —day of ——, and at other times thereafter, and before this action, obstructed said way of plaintiff by building a fence across it; [or state what the obstruction was] and defendant has ever since maintained said fence [or obstruction] without the consent of plaintiff; whereby the plaintiff has been for a long time, and is, prevented from enjoying said way, to his damage, ——— dollars;

WHEREFORE plaintiff demands judgment that said obstruction be abated; and that defendant be enjoined from erecting or maintaining any obstruction upon or across said way; and that plaintiff have and recover from the defendant ——— dollars, and plaintiff's costs of suit; and for such other or further relief as the equity of the case may warrant.

G H,
Attorney for Plaintiff.

FORM NO. 55.

COMPLAINT AGAINST A DEFENDANT CORPORATION FOR OBSTRUCTING A PUBLIC HIGHWAY.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That the defendant during the times hereinafter mentioned was and it is a corporation organized under the laws of this state;

II.

That plaintiff was on the — day of ——, and ever since has been the owner of, and in possession of lot No. ——— in block No. ———in the city of ———, in this state; and said lot during all of said time fronted, and it fronts on ——— street, a public highway in said city, and which, before the grievances hereinafter complained of, afforded unobstructed means of ingress to and egress from said lot;

III.

That said defendant has never had said street condemned for its use; and it constructed upon and along said ——— street and in front of said lot of plaintiff, on or about the month of ——— high embankments, and placed thereon wooden ties, and steel and iron rails, and ran thereon, its locomotives and trains of cars, and has ever since said month of ——— maintained upon and along said public highway said embankments and said wooden ties, and said rails thereon, and has run and runs its locomotives and trains of cars thereon, and thereby interferes materially with the ingress to and egress from said lot of plaintiff, and has thereby diminished the value of plaintiff's said lot in the sum of ——— dollars to plaintiff's damage, ——— dollars.

WHEREFORE plaintiff demands judgment against defendant for the sum of ——— dollars, and plaintiff's costs of this action, and that unless said sum of ——— dollars be paid to defendant within ——— days after judgment in this action, said obstructions be abated, and the defendant be enjoined from further maintaining the same, or any obstructions upon and along said street.

G H,
Attorney for Plaintiff.

FORM NO. 56.

COMPLAINT BY PURCHASER AT SHERIFF'S SALE FOR WASTE.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That on the — day of ——, one ——— recovered judgment duly given and made against the defendant C D in the ——— [state the name of court,] in this state, for the sum of ——— dollars; and said judgment was on the ——— day of ——— entered and docketed in the office of the clerk of said court.

II.

That at the time said judgment was so entered and docketed said C D, the person against whom said judgment was rendered, entered and docketed, was the owner in fee simple of a tract of land situate in said county of ——— in this state, and which was bounded and described as [describe the land] and which land was not then and has not been since exempt from execution;

III.

That on the — day of —— an execution was issued out of said court to enforce said judgment, and the same was delivered to the sheriff of said county of ———, under and by virtue of which, said sheriff levied on said land and advertised and sold the same to plaintiff, who paid the purchase price therefor, and said sheriff executed and delivered to plaintiff a certificate of such sale; and subsequently, and on the — day of ——, and before this action, said sheriff, by reason of such judgment, execution, levy and sale, executed and delivered to plaintiff a deed of said tract of land, pursuant to such judgment, execution and sale;

IV.

That intermediate such sale, and the delivery of said deed, the defendant C D was in possession of said tract of land; and while so in possession, and without the consent of plaintiff, the defendant cut down and removed from said land ——— trees which were growing thereon, and removed fences, which were on said land, and which constituted a part of the realty;

and thereby he diminished the value of said tract of land in the sum of ——— dollars, to plaintiff's damage ——— dollars.

WHEREFORE plaintiff demands judgment against defendant for ——— dollars; and the plaintiff's costs in this action.

G H,
Attorney for Plaintiff.

FORM NO. 57.

COMPLAINT AGAINST DEFENDANT FOR ASSAULT AND BATTERY.

[*Name of Court.*]

Plaintiff complains and alleges:

That on the — day of ——, at the county of —— in this state, defendant violently assaulted plaintiff and beat him severely, and tore his clothes; and the plaintiff was by such beating made ill and lame, and was disabled from attending to his business for ——— days, and was compelled to pay ——— dollars in endeavoring to be cured; and plaintiff has been ever since said beating, and for a long time will be, by reason thereof, lame; and plaintiff has sustained injuries by said acts of the defendant, to his damage ——— dollars.

WHEREFORE plaintiff demands judgment against defendant for ——— dollars, and plaintiff's costs in this action.

G H,
Attorney for Plaintiff.

FORM NO. 58.

COMPLAINT AGAINST A DEFENDANT FOR MALICIOUS PROSECUTION.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That on the — day of ——, at the county of ———, in this state, the defendant maliciously intending to injure plaintiff in his good name and reputation, appeared before ———, a

justice of the peace of said county, and maliciously, and without any probable cause whatever, charged plaintiff before said justice of the peace with having [state what the charge was]; and maliciously, and without probable cause, procured said justice of the peace to issue a warrant for the arrest of plaintiff upon said charge:

II.

That said justice of the peace issued said warrant accordingly, and plaintiff was arrested and imprisoned under the same for — hours, and he was obliged to, and actually did give bail in the sum of ——— dollars, to answer said charge;

III.

That afterwards, and on the — day of ——, plaintiff was examined before said justice of the peace for the said supposed crime so charged, and after such examination said justice of the peace adjudged plaintiff not guilty thereof, and fully acquitted him of the same, and ordered that he be discharged; and since that time the defendant has not further prosecuted said charge, but has abandoned the same;

IV.

That by reason of the premises plaintiff was injured in his reputation and person, and was prevented from attending to his business, and by said acts of the defendant plaintiff has been injured to his damage ——— dollars.

WHEREFORE plaintiff demands judgment against defendant for ——— dollars, and plaintiff's costs of suit.

G H,
Attorney for Plaintiff.

FORM NO. 59.

COMPLAINT AGAINST A DEFENDANT FOR LIBEL WHEN THE WORDS ARE LIBELOUS ON THEIR FACE.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That on the — day of ——, at the county of ———, in this

state, and at other places in this state, the defendant maliciously published, concerning the plaintiff, in a newspaper called the ———, an article containing the false and defamatory matter following, namely: [give extracts from the article stating such defamatory matter]; and said publication was read by many persons;

II.

That by means of said publication the plaintiff was injured in his reputation, to his damage, ——— dollars.

WHEREFORE plaintiff demands judgment against defendant for ——— dollars; and plaintiff's costs in this action.

G H,
Attorney for Plaintiff.

FORM NO. 60.

COMPLAINT AGAINST A DEFENDANT FOR LIBEL WHEN THE WORDS ARE NOT LIBELOUS ON THEIR FACE.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That on the — day of ——, a house which plaintiff owned in the city of ———, in this state, was burned down, and it was suspected that it had been feloniously set on fire;

II.

That the defendant knew that said house had been burned down, and that it was suspected that such house had been feloniously set on fire; and he, having such knowledge, on —, the — day of ——, composed and published concerning plaintiff, in said county of ———, the following false libel, namely: "He", meaning the plaintiff, "insured his house for more than its value shortly before it was burned down, and he," meaning plaintiff, "expected to receive the money for which the house was insured if it was burned down, and he," meaning plaintiff, "knows who set fire to the house." Thereby meaning that the plaintiff had feloniously set fire to said house, to the damage of plaintiff, ——— dollars.

WHEREFORE plaintiff demands judgment for ——— dollars, and plaintiff's costs of this action.

G H,
Attorney for Plaintiff.

FORM NO. 61.

COMPLAINT AGAINST A DEFENDANT FOR SLANDER WHEN THE WORDS SPOKEN ARE ACTIONABLE IN THEMSELVES.

[*Name of Court.*]

Plaintiff complains and alleges:

That on the — day of ——, at the county of ———, in this state, the defendant, in the presence and hearing of one ——— and of a number of other persons, spoke concerning the plaintiff the false and defamatory words following: [set out the actionable words spoken]; whereby the plaintiff was injured in his reputation, to his damage, ——— dollars.

WHEREFORE plaintiff demands judgment against defendant for ——— dollars, and plaintiff's costs in this action.

G H,
Attorney for Plaintiff.

FORM NO. 62.

COMPLAINT AGAINST A DEFENDANT FOR SLANDER WHEN THE WORDS ARE NOT ACTIONABLE IN THEMSELVES.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That at the time of the commission of the grievances hereinafter mentioned, plaintiff was engaged in business as a retail grocer in the county of ———, in this state, and had always maintained a good reputation as such retail grocer;

II.

That on the — day of ——, at the county of ———, in this state, the defendant, in the presence and hearing of a number of persons, maliciously, and with intent to cause it to be believed

that plaintiff was dishonest in his said business, spoke concerning this plaintiff and his said business the false and defamatory words following, namely: [state the words spoken complained of.]

III.

That by reason thereof a number of persons, and in particular, [name the persons] who had theretofore been accustomed to deal with plaintiff in his business as aforesaid, ceased to deal with him, and the plaintiff was thereby deprived of their custom, and of the profits which he would otherwise have made by a continuance of their custom; and plaintiff was injured in his reputation, to his damage, from said injuries, ——— dollars.

WHEREFORE plaintiff demands judgment against defendant for ——— dollars, and plaintiff's costs of this action.

G H,
Attorney for Plaintiff.

FORM NO. 63.

COMPLAINT AGAINST DEFENDANT FOR SLANDER OF TITLE.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That plaintiff was on the — day of ——, and ever since has been, the owner in fee of a tract of land situate in the county of ———, in this state, bounded and described as [describing it] and he caused the same, and while he was so the owner thereof, to be put up and exposed for sale at public auction on said — day of ——;

II.

That the defendant, well knowing the premises, maliciously, and without probable cause, and to cause it to be suspected that plaintiff did not own said tract of land and could not make a good title thereto, and to prevent him from effecting a sale thereof, did then and there publicly say in the presence and hearing of one ———, and of many persons then and there assembled for the purpose of bidding on said property and

buying the same, concerning plaintiff and his said property, the false and defamatory matter, namely: [state what was said.]

III.

That by reason thereof said ——— and ——— [naming the persons] who attended at said auction sale for the purpose of buying thereat said tract of land, were dissuaded from bidding for said tract of land, and refused and still refuse to purchase the same, and the plaintiff by reason thereof has been unable to sell the same; and plaintiff has expended ——— dollars for the purpose of said auction, and has been injured by said acts of the defendant, to his damage, ——— dollars.

WHEREFORE plaintiff demands judgment against defendant for ——— dollars, and plaintiff's costs of this action.

G H,
Attorney for Plaintiff.

FORM NO. 64.

COMPLAINT AGAINST A DEFENDANT FOR SEDUCTION.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That on the — day of ——, at the county of ———, in this state, ———, the defendant, with force and arms, ill treated plaintiff and made an indecent assault upon her, and then and there forcibly debauched and carnally knew her, whereby she became pregnant and sick with child, and so remained and continued for the space of ——— months; at the expiration of which time on the — day of —— she was delivered of a child, of which she was pregnant, as aforesaid;

II.

That in consequence of said indecent assault made by the defendant on the plaintiff, she has suffered greatly in her health, and became sick, and so continued for the space of ——— months; during which time she suffered great pain, and was prevented from transacting her necessary business affairs, and she has been greatly disturbed in her peace of mind, and has

been injured by said acts of defendant, to her damage, ——— dollars.

WHEREFORE plaintiff demands judgment against defendant for ——— dollars, and her costs in this action.

G H,
Attorney for Plaintiff.

FORM NO. 65.

COMPLAINT AGAINST DEFENDANT FOR THE SEDUCTION OF PLAINTIFF'S DAUGHTER.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That at the times hereinafter mentioned one E F was the daughter of plaintiff;

II.

That on the — day of ——, at the county of ———, in this state, the defendant, well knowing said E F to be the daughter of the plaintiff, contriving and intending to injure plaintiff, and to deprive him of the assistance and service of his said daughter, did wilfully, and without the privity or consent of the plaintiff, forcibly debauch and carnally know said E F, whereby she became pregnant and sick with child, and so remained and continued for the space of ——— months; at the expiration of which time on the — day of ——, she was delivered of such child, of which she was pregnant, as aforesaid, and by reason thereof she was ill and sick for a long space of time; and during all of the time she was sick by reason of said indecent assault, plaintiff was deprived of her services, and was obliged to and did expend ——— dollars for the services of a doctor and for nursing and taking care of her in her said pregnancy, and in her said sickness; and was injured by said acts of the defendant to his damage, ——— dollars.

WHEREFORE plaintiff demands judgment against defendant for ——— dollars, and plaintiff's costs in this action.

G H,
Attorney for Plaintiff.

FORM NO. 66.

COMPLAINT AGAINST DEFENDANT FOR ENTICING AWAY PLAINTIFF'S WIFE.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That K L is, and at all the times hereinafter mentioned, was the wife of plaintiff;

II.

That in the month of ———, and while plaintiff was living and cohabiting with and supporting his said wife in ———, at the county of ———, in this state, and while they were living together happily as husband and wife, the defendant, knowing that she was the wife of ———, plaintiff, and contriving and intending to injure plaintiff, and to deprive him of her comfort, society and aid, enticed her away from the plaintiff and her then residence in ——— to a separate residence in ———, and has ever since, there detained and harbored her, against the consent of plaintiff;

III.

That by reason of the premises the plaintiff has been and still is deprived by the defendant of the comfort, society and aid of his said wife, and has suffered great distress of mind, and by reason of the premises plaintiff has been greatly injured, to his damage, ——— dollars.

WHEREFORE plaintiff demands judgment against defendant for ——— dollars, and plaintiff's costs in this action.

G H,
Attorney for Plaintiff.

FORM NO. 67.

COMPLAINT AGAINST DEFENDANT FOR CRIMINAL CONVERSATION WITH PLAINTIFF'S WIFE.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That K L is, and at the times hereinafter mentioned, was the wife of plaintiff;

II.

That in the month of ———, while plaintiff was living happily with his said wife, and he was supporting her, and the defendant knew she was the wife of plaintiff, the defendant, contriving and intending to injure plaintiff and to deprive him of the comfort, society, aid and assistance of his said wife, on the — day of ——, at the county of ———, in this state, wickedly, wilfully, and maliciously debauched and carnally knew the said ———, without the privity or consent of plaintiff;

III.

That thereby, the affection which said K L had for the plaintiff was alienated and destroyed, and plaintiff was deprived of the comfort, society, aid and assistance which he otherwise would have had from said K L, plaintiff's said wife; and he has suffered great distress of mind; to his damage, ——— dollars.

WHEREFORE plaintiff demands judgment against defendant for ——— dollars, and plaintiff's costs in this action.

G H.
Attorney for Plaintiff.

FORM NO. 68.

COMPLAINT AGAINST DEFENDANT FOR GOODS AND CHATTELS WRONGFULLY TAKEN AND DETAINED.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That on the — day of ——, plaintiff was, and ever since has been, the owner, and until the grievances hereinafter mentioned, was in the possession of goods and chattels, namely: [describe the goods and chattels] of the value of ——— dollars;

II.

That on the — day of ——, at ———, in the county of ———, in this state, the defendant unlawfully took said goods and chattels from the possession of this plaintiff, and has ever since unlawfully withheld the possession thereof from plaintiff, to his damage, ——— dollars.

WHEREFORE plaintiff demands judgment for the recovery of the possession of said goods and chattels, or for the sum of ——— dollars, the value thereof, in case a delivery cannot be had, together with ——— dollars, his damages, and for his costs of suit.

G H,
Attorney for Plaintiff.

FORM NO. 69.

COMPLAINT FOR GOODS AND CHATTELS WRONGFULLY TAKEN FROM THE POSSESSION OF PLAINTIFF'S LESSEE.

[*Name of Court.*]

Plaintift complains and alleges:

I.

That at the times hereinafter mentioned plaintiff was, and ever since has been the owner of the following described goods and chattels, namely: [describe the goods and chattels] of the value of ——— dollars; which goods and chattels were during a portion of said times in the possession of one E F, under a lease thereof from plaintiff for a term of ——— months, commencing on the — day of ——;

II.

That on the — day of ——, at ———, in the county of ———, in this state, the defendant wrongfully took said goods and chattels from the possession of said E F, and has ever since unlawfully held the possession thereof;

III.

That before this action the time for which plaintiff had leased said goods and chattels to said E F had expired, and plaintiff thereafter, and on the — day of —— demanded the possession of said goods from the defendant; but the defendant refused to deliver the possession of said goods to plaintiff, and has ever since unlawfully withheld the possession thereof from plaintiff, to plaintiff's damage, ——— dollars.

[Demand for judgment as in form No. 68.]

G H,
Attorney for Plaintiff.

FORM NO. 70.

COMPLAINT FOR WRONGFUL DETENTION OF GOODS AND CHATTELS.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That on the — day of ——, plaintiff was the owner and in possession of goods and chattels described as [describe them] of the value of ——— dollars, and plaintiff has ever since been the owner thereof;

II.

That on the — day of ——, and while plaintiff was so the owner and in the possession of said goods and chattels, one E F, [or some persons to plaintiff unknown] without the consent of plaintiff, took said goods and chattels from the possession of plaintiff and unlawfully detained the same from plaintiff;

III.

That thereafter, the said goods and chattels came into the possession of the defendant; and thereafter, on the — day of ——, and while said goods and chattels were so in possession of the defendant, plaintiff demanded of defendant the possession of the same; but defendant refused, and refuses to deliver the same to plaintiff, and has ever since unlawfully withheld the possession thereof from plaintiff, to plaintiff's damage, ——— dollars.

WHEREFORE [as in form No. 68].

G H,
Attorney for Plaintiff.

FORM NO. 71.

EJECTMENT—GENERAL FORM.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That plaintiff is the owner and seized in fee [or other estate

describing it] of the following described premises: [describe the same.]

II.

That defendant is in possession of the same and unlawfully withholds the possession thereof from plaintiff, to his damage, ——— dollars.

WHEREFORE plaintiff demands judgment against defendant for the possession of said premises; and for ——— dollars, plaintiff's damages by the withholding of the same; and plaintiff's costs of suit.

G H,
Attorney for Plaintiff.

FORM NO. 72.

EJECTMENT, AND FOR USE AND OCCUPATION.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That on the — day of —— plaintiff was, and ever since has been, the owner and seized in fee [or of other estate describing it] of the following described premises: [describe the same] and was on said day in the possession thereof; and on said day, and while the plaintiff was so the owner and in possession of said real estate, the defendant entered into said premises, and ousted plaintiff therefrom; and the defendant has ever since unlawfully withheld from plaintiff the possession thereof, to plaintiff's damage, ——— dollars;

II.

That the value of the use and occupation of said premises, since said — day of ——, and while plaintiff has been excluded therefrom by defendant, is, and will hereafter be ——— dollars per month.

WHEREFORE plaintiff demands judgment against defendant for the possession of said premises; for ——— dollars, plaintiff's damage by the withholding of the same; and for the

further sum of ——— dollars, the value of the use and occupation thereof; and plaintiff's costs of suit.

G H,
Attorney for Plaintiff.

FORM NO. 73.

COMPLAINT BY REPRESENTATIVES OF A DECEDENT FOR DAMAGES FOR NEGLIGENT ACTS CAUSING HIS DEATH.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That the defendant was at the times hereinafter mentioned, and is, a corporation, created by and under the laws of this state, and was and is a common carrier of persons and property, for hire, between the places hereinafter mentioned, and was the owner, [or in possession of] the cars, train of cars, and railroad tracks hereinafter mentioned;

II.

That on the — day of —— defendant received one A B, who was then of the age of ——— years, into such train of cars for the purpose of conveying him therein as a passenger from ——— to ——— for ——— dollars, paid it by said A B;

III.

That the defendant and its servants and employees so negligently and unskillfully conducted itself and themselves in the management of said train of cars, and in not keeping the track of said railroad in a proper condition [or state other acts of defendant that caused the injury complained of] that said train, while proceeding from ——— to ——— was thrown from the track, and the car in which said A B then was, was thrown down an embankment [or state otherwise how said passenger was injured] and the said A B was thereby so injured that it caused his death, to the damage of his heirs and personal representatives, ——— dollars, which are wholly unpaid;

IV.

That thereafter, and on the — day of ——, by the order

of the Superior Court of California, in ——— county, duly given and made, the plaintiff, ———, was appointed administrator of the estate of said decedent, and letters of administration on his estate were granted to plaintiff; and plaintiff qualified as such administrator, and thereupon such letters of administration were issued to plaintiff on the — day of ——, and plaintiff has been ever since such administrator.

WHEREFORE plaintiff demands judgment against defendant for ——— dollars, and plaintiff's costs of suit.

G H,
Attorney for Plaintiff.

This action is given by statute, Code of Civil Procedure, section 377.

FORM NO. 74.

COMPLAINT TO HAVE RESTRAINED INFRINGEMENT OF TRADE MARK, AND FOR DAMAGES.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That the plaintiff is, and for a long time prior to the committing of the grievances hereinafter mentioned, had been, the manufacturer and vendor of an article known as ———, which he has for ——— years last past offered for sale and sold in packages labelled with his own proper device and trade mark adopted by plaintiff for that purpose in the year ——, of which label, and the trade mark thereon the following is a copy: [Insert copy.]

II.

That by reason of the long experience and great care of plaintiff in his said business and in the preparation of said article, and the good quality of the same, said article became widely known in the community as a valuable and useful article, and acquired a high reputation as such, and has commanded an extensive sale at ——— and elsewhere, which has been a source of great profit to plaintiff;

III.

That the defendant knew of plaintiff's right to said trade

mark, and while he had such knowledge the defendant in the year ——, and ever since thereafter, caused to be put up in similar packages and labelled with a similar label, of which label the following is a copy: [insert copy] an inferior and similar article, and has offered for sale, and sold such similar and inferior article so labelled with such similar label; and such imitation article so labelled and offered for sale, and sold by defendant, is calculated to deceive the purchasers and consumers of plaintiff's said article, and actually has and does mislead many of them to buy the said article sold by defendant; and thereby the general esteem and reputation of said article prepared and sold by plaintiff has been injured; all of which acts of defendant have been to the great diminution of said business and profits of plaintiff; and by reason thereof plaintiff has been greatly injured, to his damage, ——— dollars.

WHEREFORE plaintiff demands judgment against defendant that he and his agents and servants be forever enjoined and restrained from preparing and from selling said imitation article, labelled with such imitation labels of plaintiff's said label; and that defendant account for and pay over to plaintiff all profits realized by defendant upon sales of said imitation article in packages labelled with such imitation labels; and for ——— dollars, damages; and for such other relief as the equity of the case may warrant; and for plaintiff's costs of this action.

G H,
Attorney for Plaintiff.

FORM NO. 75.

COMPLAINT THAT PARTIES INTERPLEAD.

[*Name of Court.*]

A B, plaintiff, v. C D and E F and I J, defendants.

Plaintiff complains and alleges:

I.

That on the — day of —— the defendant C D deposited with plaintiff for safe keeping the goods and chattels following namely: [describe them] of the value of ——— dollars;

II.

That thereafter, the defendant E F claimed the same under an alleged assignment and transfer thereof to him made by the said C D; and the defendant I J claimed the same under an order made by said C D that they be delivered to him, said I J;

III.

That plaintiff is ignorant of the respective rights of said E F and I J and he has no claim upon or against said goods and chattels, and is ready and willing to deliver them to such person as the court shall direct; and this action is not brought by collusion with either or any of the defendants.

WHEREFORE the plaintiff demands judgment, that defendants be restrained from taking proceedings against plaintiff in relation to said goods and chattels, or any part thereof; that they be required to interplead together concerning their claims to said property; that some person be authorized to receive such property, pending litigation; and that on the delivery thereof by plaintiff to such person plaintiff be discharged from all liability to either and all of the defendants, in relation thereto; and that plaintiff's costs of suit be paid out of said property.

G H,
Attorney for Plaintiff.

Should an action have been brought against a defendant by a claimant of property, and another person claims the same property, an interpleader may be ordered by the court upon notice to said claimants, and upon an affidavit of the original defendant, showing that such order of interpleader should be made. Code of Civil Procedure, section. 386.

FORM NO. 76.

AGAINST A JUDGMENT DEBTOR AND THE PERSON TO WHOM HE HAS FRAUDULENTLY CONVEYED PROPERTY.

[*Name of Court.*]

A B, plaintiff, v. C D and E F, defendants.

Plaintiff complains and alleges:

I.

That on the — day of —— plaintiff recovered judgment duly given and made in and by the Superior Court of the state

of California, in the county of ——— against the defendant C D for ——— dollars; which judgment was entered and docketed by the clerk of said court the same day, and a certified transcript of said docket of said judgment was thereafter, and on the — day of —— filed for record and recorded in the office of the county recorder of the county of ——— in this state. [The county in which the land hereinafter mentioned is situate.]

II.

That thereafter two executions were issued to enforce said judgment, one of which was on the — day of —— delivered to the sheriff of said county of ——— [the county of the then residence of the said defendant]; and the other of which was the same day delivered to the sheriff of the county of ———, [the county in which the land hereinafter mentioned is situate.]

III.

That before this action, said executions were returned wholly unsatisfied, and said judgment is wholly unpaid and unsatisfied;

IV.

That prior to the entry of said judgment, but after the indebtedness upon which said judgment was rendered had been incurred, the defendant C D, for the purpose of defrauding plaintiff, and to prevent him from collecting said indebtedness, conveyed to the defendant E F real estate of said defendant C D, situate in said county of ———, and which is described as follows: [describe it] and which real estate was not, and never has been exempt from execution. And said defendant E F knew of said indebtedness of the defendant C D to plaintiff, and he received said conveyance so made for the purpose of defrauding plaintiff, and to prevent him from collecting said indebtedness;

V.

That there was no consideration for said conveyance of said real estate [or if there was a consideration, state wherein it was fraudulent] and the said defendant C D had, after he made said conveyance, no property standing in his name, out of which the said judgment of plaintiff could be satisfied in whole or in part.

WHEREFORE plaintiff demands judgment against the defendants, that said conveyance of said real estate be set aside and declared void; and that said defendants, and each of them, be enjoined from disposing of, transferring, or incumbering said real estate; that an alias execution be issued out of this court directed to the sheriff of said county of ———, empowering and commanding him to sell said real estate to satisfy said judgment, or so much thereof as may be necessary to satisfy the same; and for such other or further relief as the equity of the case may warrant; and plaintiff's costs of suit.

G H,
Attorney for Plaintiff.

Such action should be commenced in the county in which the land is situate; and a lis pendens should be filed in that county.

FORM NO. 77.

AGAINST A DEFENDANT TO ANNUL A CONTRACT.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That on the — day of ——, plaintiff was the owner of a lot situate in the city of ———, in the county of ———, in this state, described as [describe it] of the value of ——— dollars;

II.

That plaintiff was then old, infirm, and his eyesight was much impaired, and by reason thereof he was incapacitated from attending properly to business, all of which was known to defendant; and said defendant, for the purpose of defrauding plaintiff out of said lot, on said — day of —— procured plaintiff to execute an instrument in writing, which, plaintiff alleges upon his information and belief, was a deed conveying to the defendant said lot of plaintiff, but which instrument in writing defendant falsely represented to plaintiff was a lease of said lot for one year, and plaintiff, believing such representations to be true, and by reason of said representations, executed such instrument in writing, and acknowledged the execution thereof, and delivered the same to defendant, and plaintiff alleges that there was

and is no consideration for such deed, and plaintiff further alleges that on the — day of — defendant caused said instrument in writing to be recorded as a deed in the office of the recorder of said county of ———. .

WHEREFORE plaintiff asks judgment, that said instrument in writing be adjudged to be void, and that it be further adjudged that defendant convey to plaintiff the legal title defendant acquired by said conveyance made by plaintiff to him of said lot, and acknowledge such conveyance so that it can be recorded, and for such other and further relief as the equity of the case may warrant, and for plaintiff's costs of suit.

G H,
Attorney for Plaintiff.

FORM NO. 78.

AGAINST A VENDEE TO ENFORCE LIEN FOR PURCHASE MONEY.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That the plaintiff was on the — day of —— the owner in fee of real property described as [describe the real estate] and while so the owner of said real estate he did on said day sell the same to the defendant for the sum of ——— dollars, and thereafter, and on the same day, by his deed he conveyed the same to said defendant in fee;

II.

That on such sale and conveyance the defendant paid to the plaintiff the sum of ——— dollars, a part of the purchase money for which said real estate was so sold, and promised to pay to plaintiff within ——— days thereafter the sum of ——— dollars, the balance of said purchase money, but defendant has not paid the same, and the same is due and wholly unpaid; that said balance of said purchase money is unsecured except by the vendor's lien sought to be enforced in this action.

WHEREFORE plaintiff demands judgment against the defendant for the sum of ——— dollars, and the interest thereon at

the rate of — per cent. per annum from the — day of ——, and plaintiff's costs of suit, and that the same is a lien on said real estate, and that said property, or so much thereof as may be necessary for that purpose, be sold, and the proceeds thereof be applied to the payment of the judgment so to be rendered, and for such other or further relief as the equity of the case may warrant, and for costs of suit.

G H,
Attorney for Plaintiff.

In case the real estate has been sold and conveyed by the vendee, and the purchaser knew at the time of the sale and conveyance that the plaintiff's said vendee had not paid plaintiff the whole purchase money, or if there were a fraudulent conveyance, or other facts existed which would give to plaintiff a right to foreclose his vendor's lien, such facts should be stated in the complaint, and all proper persons should be made defendants in the action.

FORM NO. 79.

AGAINST MORTGAGEE TO REDEEM.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That on the — day of —— plaintiff made to the defendant plaintiff's promissory note in writing, of which the following is a copy: [Insert copy.]

And the plaintiff at the time he made said promissory note was, and ever since has been the owner of real property described as [describe said real property] and the plaintiff, on the date of the making of said promissory note, and to secure the payment thereof, executed, acknowledged and delivered to defendant a mortgage of said real property, which mortgage plaintiff had recorded in the office of the county recorder of ——— county, in this state, of which mortgage, and the certificate of the acknowledgment, and of the recording thereof, the following are copies: [Insert copies.]

II.

That plaintiff has paid to defendant all the interest on the principal of said promissory note up to the — day of ——, and

on the — day of ——, when [or after], the said promissory note became due, plaintiff offered to pay, and tendered to the defendant the sum of ——— dollars, the principal of said promissory note, together with the sum of ——— dollars, all the interest then due thereon, and demanded that said mortgage be cancelled, and plaintiff has ever since been able, ready and willing and offers to pay the same, and any other sum which the court may determine to be due thereon, but the defendant refused to receive the same or to deliver up said mortgage to be cancelled, and refused to discharge said mortgage of record.

WHEREFORE the plaintiff demands judgment, that an account be taken of the amount now due said defendant on said note and mortgage, and that plaintiff may be at liberty to redeem said mortgaged premises, and to have delivered up and cancelled said promissory note and mortgage upon payment of whatever may be found so due, and that the defendant upon such payment, satisfy and discharge said mortgage of record, and for such other or further relief as the equity of the case may warrant, and for $100 statutory penalty for defendant's refusal to discharge said mortgage, and for plaintiff's costs in this action.

G H,
Attorney for Plaintiff.

FORM NO. 80.

ACTION FOR THE DISSOLUTION OF A CO-PARTNERSHIP.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That on the — day of —— plaintiff and defendant formed a partnership under written articles of partnership, of which the following is a copy: [Insert copy.]

[Or if the contract of partnership was not in writing, state its legal effect.]

II.

That plaintiff and defendant on the — day of —— commenced to carry on, and have ever since continued to carry on said partnership business under said partnership contract;

III.

That since the commencement of said partnership business the defendant has from time to time used for his individual use and benefit large sums of money from the receipts and profits of said partnership business, exceeding the proportion thereof to which he was entitled, and has refused and still refuses to account with the plaintiff for the same, although plaintiff has requested of the defendant that such accounting be had;

IV.

That as plaintiff is informed and believes, the defendant has received about the sum of ——— dollars over and above his just proportion of the copartnership profits, and that he continues to collect the debts due the copartnership and appropriate the money so collected to his individual use.

WHEREFORE plaintiff demands judgment against defendant that said copartnership be dissolved, that an account be taken of the affairs of said copartnership, that a receiver be appointed to take possession of the property and assets of the partnership, and to sell the property of said partnership, and collect the debts due said partnership, and out of the money so realized that he pay the expenses of the receivership, the debts of said partnership, and that the residue, if any, be divided between plaintiff and defendant, according to their respective interests, and for such other and further relief as the equity of the case may warrant, and for plaintiff's costs of suit.

G H,
Attorney for Plaintiff.

FORM NO. 81.

ACTION FOR PARTITION OF PROPERTY.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That plaintiff and the defendants [name defendants who are owners in fee] own in fee and possess as tenants in common, real property which is described as [describe the real property] and that plaintiff is desirous of a partition of the same;

II.

That the plaintiff is the owner in fee of an estate in said real property of an undivided one-fourth part thereof, and that the defendant [cotenant as owner in fee] is the owner in fee of an estate therein, namely: of an undivided ——— part in the fee thereof; [and state in like manner the ownership of each of the cotenants who are the owners as tenants in common with plaintiff, of the fee of such real property.]

III.

That the defendant ——— is the owner under a lease for the term of five years, of an undivided portion of said real property, so owned by the defendant;

IV.

That the defendant ——— holds a judgment, duly given and made on the — day of ——, by the Superior Court of the state of California in the county of ——— against the defendant ——— for ——— dollars, and said judgment was entered and docketed the same day, and remains unpaid, and unsatisfied of record;

V.

That the defendant ——— holds a mortgage, which is of record, upon the said estate and interest of the defendant in said land for ——— dollars, payable on the — day of ——, with interest thereon from the — day of ——, at the rate of ——— per cent. per annum.

WHEREFORE plaintiff demands judgment that the respective interests of the parties to this action in said real property be adjudged and determined by the court, and that a partition and division of said premises be made according to the respective rights of said parties, or if a partition of said real property cannot be made without material injury to such rights, then for a sale of said premises, and a division of the proceeds among the parties according to their respective rights, after the payment from the proceeds of sale of the costs of this action, and for such other or further relief as the equity of the case may warrant.

G H,
Attorney for Plaintiff.

In most of the states the action of partition is regulated by statute, and

the provisions of such statute must be complied with in the pleadings and proceedings.

FORM NO. 82.

COMPLAINT IN AN ACTION TO QUIET TITLE.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That plaintiff is, and for many years last past, has been, the owner in fee of a tract of land in the county of ——— in the state of California, described as; [describe it.]

II.

That the defendant C D claims to be the owner of said land, but such claim is invalid, and by reason of said claim of said C D plaintiff's title to said land is clouded, and the value of said land to plaintiff is depreciated.

WHEREFORE plaintiff demands judgment that defendant's claim of title to said land is invalid, that plaintiff is the owner of said land, and that said defendant has no title thereto; that plaintiff's title to said land be quieted against the defendant and against all claim of defendant to said land, and for such other or further relief as the equity of the case may warrant, and for plaintiff's costs of suit.

G H,
Attorney for Plaintiff.

FORM NO. 83.

COMPLAINT IN AN ACTION FOR A DIVORCE.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That plaintiff and defendant intermarried on the — day of —— at ——— in the state of ———and they have been ever since husband and wife;

II.

That plaintiff has been a resident of the state of California

continuously for more than one year next prior to the commencement of this action, and a resident of said county of ——— continuously for more than three months next prior to the commencement of this action;

III.

That the defendant without any connivance on the part of the plaintiff and without the consent of or collusion with plaintiff, committed adultery with one E F on or about the — day of —— in the city of ———, California, and at other times and about the same time committed adultery in said city of ——— with said E F, and plaintiff has never condoned said offenses nor any of them;

(Other causes for a divorce may be alleged in the complaint, but such causes for a divorce must be separately stated, and the marriage and jurisdictional facts of residence must be stated in each cause for a divorce alleged in the complaint.)

IV.

That plaintiff and defendant have acquired, since their marriage, property which is their community property, and the defendant has concealed from plaintiff a part of such community property, and plaintiff is unable to give a description of the same; that the following is a description of the community property of plaintiff and defendant of which plaintiff has knowledge; [describe such property.]

V.

That children have been born to plaintiff and defendant since their said marriage and the names and ages of the children so born, who are now surviving, are [state the names and ages of such children] and the children so surviving, who are minors, reside with plaintiff, and plaintiff is a fit and proper person to have the custody of such minors, and to care for their maintenance and education;

VI.

That plaintiff has no separate property, and cannot pay the reasonable fee of her attorney in this action or the costs of the action or for her maintenance and support or for the maintenance and support of said minor children during the pendency of the action;

VII.

That defendant is the owner of a large amount of property,

which is his separate property from which he derives a net income of not less than ——— dollars each year.

WHEREFORE plaintiff asks for an order of court that the defendant pay to her a reasonable amount to be fixed by the court, for the fee of her attorney in this action, for her costs in this action, and for the support of herself and of said minor children during the pendency of the action, and plaintiff demands judgment that the marriage between plaintiff and defendant be dissolved, that an accounting be had of the community property of plaintiff and defendant and that the same be divided between them in such a manner as may be just and equitable; that defendant pay to her, each month, after the dissolution of said marriage such sum for her maintenance and that of said minor children as to the court may seem reasonable and just, and for such other and further relief as the equity of the case may warrant, and for costs of suit.

G H,
Attorney for Plaintiff.

FORM NO. 84.

COMPLAINT AGAINST DEFENDANT FOR DAMAGES TO LAND AND CROPS CAUSED BY OVERFLOW OF WATER.

[*Name of Court.*]

Plaintiff complains and alleges:

I.

That at the times hereinafter mentioned plaintiff was the owner and possessed of real property described as [describe it.]

II.

That at said times the defendant was the owner and possessed of another tract of land described as [describe it], and said land of plaintiff was and is in the vicinity of said land of defendant;

III.

That said land of defendant was and is lower than said land of plaintiff, and in times of high water a large quantity of water, until the wrongs and injuries hereinafter mentioned, flowed over

said land of defendant, and none of said water flowed on or over said land of plaintiff;

IV.

That near the time of the commencement of the cropping season of ———, the defendant constructed and has ever since maintained on his said land and on or near the boundary line thereof, dams and a levee which prevented and prevents waters, during times of high water, from flowing on and over said land of defendant, when, were it not for said dams and levee such waters would have flowed on and over the land of defendant. And defendant by said dams and levee caused and causes such waters to be diverted to, and to flow on and over the land of plaintiff, when were it not for such dams and levee they would not have flowed, or flow, on or over said land of plaintiff;

V.

That during said cropping season of ——— plaintiff had on his said land large growing crops of wheat and barley which plaintiff owned, and which were, when the injury hereinafter mentioned was caused to plaintiff's said crops and land, of the value of ——— dollars;

VI.

That in the month of ——— a large body of waters, which, were it not for said dams and levee, would have flowed on and over said land of defendant, and would not have flowed on or over said land of plaintiff, were by said dams and levee diverted from their natural course, and were caused to flow over said land of plaintiff, and his said growing crops thereon, whereby said land of plaintiff and his said growing crops thereon were greatly injured to plaintiff's damage, ——— dollars.

WHEREFORE plaintiff demands judgment that said dams and levee be abated and that defendant be enjoined and restrained from maintaining the same, and for judgment against defendant for ——— dollars, and for plaintiff's costs of suit.

G H,
Attorney for Plaintiff.

Should the plaintiff wish to have subsequent pleadings in an action verified, he must verify or have verified his complaint; and such verification should be as follows:

FORM NO. 85.

VERIFICATION BY THE PARTY HIMSELF.

State of ———, County of ———, ss.

——— being duly sworn, deposes and says that he is the plaintiff in this action, that he has read [or heard read] the foregoing complaint, and knows the contents thereof, and that the same is true of his own knowledge except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

Signature of Plaintiff.

Subscribed and sworn to before me this — day of ——.

Signature of officer before whom verification is made.

Seal of officer, if he have a seal.

FORM NO. 86.

VERIFICATION BY THE ATTORNEY OF PLAINTIFF.

[*Venue.*]

——— being duly sworn, deposes and says that he is the attorney of the plaintiff in this action, and that he has read the foregoing complaint, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true. That the reason this verification is not made by the plaintiff is that he is absent from the county of ———, which is the county in which deponent resides.

Signature.

[*Jurat.*]

If the facts stated in the pleadings are within the knowledge of any person he may verify a pleading, stating the reason therefor. Similar forms may be used for the verification of a petition or an answer.

property from this affiant, and he has concealed and removed [or disposed of] said property to prevent its being found or taken by a sheriff; and this action is brought against the defendant to recover the possession of said property;]

[Or that the said defendant falsely represented to the affiant, said plaintiff, who was and is a merchant, to induce this affiant to sell him goods on credit; that the said defendant was the owner of a tract of land of about —— acres, situate in ——— county, in this state, and that there were no encumbrances on said tract of land; and induced by such representations this affiant on the — day of —— sold and delivered to said defendant goods of the value of —— dollars, and for the agreed price of —— dollars, on a credit of [three] months from such sale; and said agreed price therefor is due and wholly unpaid; and said representations were false, and the defendant knew when they were made that they were false; and the defendant at the time of making said representations did not own, and has not since owned any land in said county of ———; and said representations were fraudulently made with intent to deceive and defraud affiant; and they did deceive and defraud him. And this action is brought to recover from the defendant —— dollars, the agreed price for said goods so sold and delivered;]

[Or that said defendant was at the commencement of the above entitled action, and is, indebted to affiant in the sum of —— dollars on an account for goods, wares and merchandise sold and delivered by affiant to said defendant; and defendant has since such sale removed [or disposed of] his property [or is about to remove and dispose of his property] to prevent the same from being applied to the payment of his debts, and with intent to defraud his creditors, of whom this affiant is one; and this action is brought to recover the sum of —— dollars, the said indebtedness to this plaintiff.]

[*Jurat.*] A B.

This affidavit must be made positively, or upon information and belief, and if upon information and belief it must state the facts on which such information and belief is founded.

Upon the presentation of the affidavit to the judge he must require an undertaking on the part of affiant, with sureties, and in an amount fixed by the judge, which must be at least five hundred dollars.

FORM NO. 93.

FORM OF THE UNDERTAKING REQUIRED BY THE JUDGE BEFORE ORDER FOR ARREST IS MADE.

[*Name of Court.*]

A B, the plaintiff in this action, having presented to the Hon. ———, judge of this court, the affidavit of plaintiff, and having asked thereon for an order of the judge of the court for the arrest of C D, the defendant; and said judge having required before making such order a written undertaking on the part of the plaintiff, with sufficient sureties, in the sum of —— dollars, fixed by the judge, now, therefore, in consideration of the premises, and to procure such order of arrest to be made, we, ——— as principal, and ——— and ——— as sureties, undertake in the sum of —— dollars, and promise the defendant, to the effect that the plaintiff will pay all costs which may be adjudged to the defendant, and all damages which he may sustain by reason of the arrest, if the same be wrongful or without sufficient cause, not exceeding said sum of —— dollars.

[*Date.*] *Signatures.*

Affidavit of sureties should be made on the undertaking, showing that they are qualified to be such sureties, as in form No. 131.

This undertaking should be approved by the judge, and filed with the clerk of the court.

Should the court make an order of arrest, it may be in the following form:

FORM NO. 94.

ORDER OF JUDGE FOR ARREST.

[*Name of Court.*]

It appearing to me from the affidavit of A B, the plaintiff in said action, that a sufficient cause of action exists, and that the case is one of those mentioned in section 479 of the Code of Civil Procedure; and the plaintiff having given the undertaking as required by me,

IT IS ORDERED that the sheriff of any county in this state where C D, the defendant in this action may be found, forthwith arrest him and hold him to bail in the sum of —— dollars; and

return this order on the — day of —— to the clerk of the court in which the above entitled action is pending.

[*Date.*] ————,

Judge.

If the order of arrest be made the affidavit for the order must be filed in the office of the clerk of the court in which the action is pending.

On the delivery of this order, and of a copy of the affidavit on which the order was made, to the sheriff of the county in which the defendant is found, the sheriff must arrest the defendant and keep him in custody until discharged, as provided by law; and he must, when he arrests the defendant, deliver to him the copy of the affidavit on which the order of arrest was made, and, if desired by the defendant, he must also deliver to him a copy of the order of arrest.

The defendant at any time before execution must be discharged from arrest, either upon giving bail, or depositing the amount mentioned in the order of arrest.

The defendant may give bail by causing a written undertaking to be executed by two or more sufficient sureties; which undertaking may be in the following form:

FORM NO. 95.

UNDERTAKING OF BAIL BY A DEFENDANT ARRESTED IN A CIVIL ACTION.

[*Name of Court.*]

C D, the defendant in this action having, under an order of arrest made on the — day of —— by the Hon. ———, judge of the Superior Court of the state of California in the county of ———, requiring the sheriff of the county where said defendant might be found to arrest the defendant and hold him to bail in the sum of —— dollars, been arrested by ———, the sheriff of ——— county, in which said defendant was found; now, therefore, we, ——— and ———, as sureties for said defendant, in consideration of the premises and to procure his discharge from such arrest, undertake in the sum of —— dollars, and promise plaintiff to the effect that the defendant in this action will at all times render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment therein; or that we will pay to A B, the plaintiff in the action, the amount of any judgment that may be recovered against the defendant in the action not exceeding said sum of —— dollars.

[*Date.*] *Signatures.*

Affidavit of the qualification of the sureties as in form 131.

Within the time limited for that purpose the sheriff must file in the office

of the clerk of the court in which the action is pending, a copy of the undertaking of bail; and within ten days thereafter, the plaintiff may serve upon the sheriff a notice that he does not accept the bail; which notice may be in the following form:

FORM NO. 96.

EXCEPTION TO BAIL.

[*Name of Court.*]

To the sheriff of ——— county, California:

You will take notice that the plaintiff in the action excepts to, and does not accept the bail given by the defendant in this action.

G H,

[*Date.*] *Attorney for Plaintiff.*

[*Address to Sheriff.*]

Within five days after the receipt of this notice the sheriff or the defendant, may give to the plaintiff or his attorney; notice of the justification of the bail (or of other bail—specifying the places of residences and occupation of the latter) before a judge of the court, or county clerk, at a specified time and place, not less than five, nor more than ten days thereafter, except by consent of parties.

If new bail justify, a new undertaking must be given. Such notice may be in the following form:

FORM NO. 97.

NOTICE OF JUSTIFICATION OF BAIL.

[*Name of Court.*]

You will take notice that the sureties on the undertaking of bail of C D, the defendant in this action [or ———, residence ———, occupation ——, and ———, residence ——, occupation ——, as sureties on another undertaking of bail] will justify as such sureties on the — day of —— before the Hon. ———, judge of said court, [or before ———, Esq., county clerk of said county of ———] at ———, and at — o'clock — m. of that day.

[*Date.*] I J,

Sheriff.

[*or C D, defendant.*]

To G H, Esq., attorney for plaintiff.

At the time and place specified in the notice, the sureties should justify, and if the judge (or county clerk) be satisfied on an examination, that the

bail is sufficient, he must reduce the examination to writing and annex it to the undertaking, and endorse his allowance thereon, and cause them to be filed.

The defendant at any time before trial or the entry of judgment, may apply to the judge who made the order of arrest, or to the court in which the action is pending upon reasonable notice to the opposite party to vacate the order of arrest, or to reduce the amount of bail. If the application be made upon affidavits on the part of defendant, but not otherwise, the plaintiffs may oppose the same by affidavits or other proofs in addition to those on which the order of arrest was made.

CLAIM AND DELIVERY.

The delivery of personal property sued for, may at the time of issuing summons in an action, or thereafter, before answer in the action, be claimed by plaintiff, under the provisions of the provisional remedy of claim and delivery, and the property claimed may be taken from the defendant.

FORM NO. 98.

AFFIDAVIT FOR CLAIM AND FOR DELIVERY.

[*Name of Court.*]
[*Venue.*]

——— being duly sworn, deposes and says: That he is the plaintiff in this action; [or that he makes this affidavit in behalf of the plaintiff in this action] that the plaintiff in the action is the owner of and entitled to the possession of the following described goods and chattels, namely: [describe them] and which are of the actual value of —— dollars;

That said goods and chattels are wrongfully detained by the defendant from plaintiff; that the alleged cause of the detention thereof, according to affiant's best knowledge, information and belief is [state the alleged cause of detention] that said property has not been taken for a tax, assessment or fine, pursuant to a statute, or seized under an execution or an attachment against the property of the plaintiff [or that said property has been seized under an execution [or an attachment] against the property of the plaintiff, and that by statute it is exempt from such seizure.]

[*Jurat.*] *Signature.*

The attorney of the plaintiff may, by an endorsement in writing upon this

affidavit, require the sheriff of the county where the property is, to take the property from the defendant, and which endorsement may be in the following form:

FORM NO. 99.

REQUIREMENT THAT THE SHERIFF TAKE PROPERTY.

To the sheriff of the county of ———:

I hereby require you to take the personal property mentioned and described in the within affidavit from the defendant named therein.

[*Date.*] G H,

Attorney for Plaintiff.

Upon the receipt of the affidavit and requirement in writing endorsed thereon, and a written undertaking executed by two or more sufficient sureties, approved by the sheriff, the sheriff must forthwith take the property described in the affidavit, if it be in the possession of the defendant, or his agent.

This undertaking, which is to be approved by the sheriff, may be in the following form:

FORM NO. 100.

UNDERTAKING FOR THE TAKING OF SUCH PROPERTY.

[*Name of Court.*]

An affidavit showing the plaintiff in this action to be entitled to the possession of the personal property therein described having been made, and an endorsement thereon in writing having been made and signed by the attorney for the plaintiff requiring the sheriff of the county of ———, in this state, to take said personal property from C D, the defendant in said action; now, therefore, in consideration of the premises, and that said sheriff take said personal property from the defendant, we, ———, and ———, undertake to the effect that we are bound to the defendant C D in the sum of —— dollars [double the value of the property stated in the affidavit] and promise the defendant that plaintiff will prosecute the above entitled action, and will return to the defendant the property described in the affidavit made to procure the taking of said property by said sheriff, if return

thereof be adjudged, and will pay to the defendant such sum as may for any cause be recovered against the plaintiff.

[*Date.*] *Signature.*

Affidavit of sureties showing their sufficiency, as in form No. 131, should be made by the sureties on the undertaking.

The sheriff, on recieving the undertaking, if he approve it, should endorse such approval thereon as follows:

FORM NO. 101.

APPROVAL OF UNDERTAKING BY SHERIFF.

I approve of the within undertaking, both as to its form and as to the sufficiency of the sureties who executed the same.

[*Date.*] *Signature of Sheriff.*

The sheriff, on taking the property, should without delay, serve on the defendant, a copy of the affidavit, of the endorsement thereon, and a copy of the undertaking, by delivering such copies to him personally if he can be found, or to his agent from whose possession the property is taken, or if neither can be found, then by leaving the same at the usual place of abode of either, with some person of suitable age and discretion; or if neither has any known place of abode, then by putting them in the nearest postoffice, directed to the defendant.

The defendant within two days after such service may give notice to the sheriff that he excepts to the sufficiency of the sureties to the undertaking, which may be in the following form:

FORM NO. 102.

EXCEPTION TO THE SUFFICIENCY OF SURETIES.

[*Name of Court.*]

You will take notice that the defendant in this action excepts to the sufficiency of the sureties to the undertaking made in this action, and which has been approved by you.

[*Date.*] *Signature of Defendant.*

[*Address to sheriff.*]

When the defendant excepts to the sufficiency of the sureties, they may justify on like notice and in like manner, as the sureties justify upon bail on arrest. (See form No. 97.)

Should the defendant not except to the sufficiency of such sureties, he may at any time before the delivery of the property to the plaintiff in the action, require the sheriff to return to the defendant the property so taken on giving an undertaking, which may be in accordance with the following form:

FORM NO. 103.

UNDERTAKING FOR THE RETURN OF SUCH PROPERTY TO DEFENDANT.

[*Name of Court.*]

The property which is described in the affidavit of the plaintiff in this action as [describe the property as in such affidavit] having been taken from said defendant C D by the sheriff of the county of ———, in this state, and said defendant having required the return of said property to him,

NOW, THEREFORE, in consideration of the premises, and to procure the return of said property to said defendant, we, the undersigned, ——— and ———, undertake to the effect that they are bound to A B, the plaintiff in the action, in the sum of —— dollars [being double the actual value of said property as stated in the affidavit of plaintiff] and promise plaintiff that defendant will deliver said property to said plaintiff, if such delivery be adjudged, and will pay to him such sum as may for any cause be recovered against the defendant.

[*Date.*] *Signatures.*

The defendant's sureties must, unless their justification be waived by plaintiff, upon notice to the plaintiff, of not less than two nor more than five days, justify before a judge or county clerk in like manner as upon bail on arrest. (See form No. 97.)

The property so taken by the sheriff from the defendant or his agent, and while in the possession of the sheriff, may be claimed by a third person, who makes and serves on the sheriff an affidavit showing his right to the same, and which may be according to the following form:

FORM NO. 104.

CLAIM OF PROPERTY BY THIRD PERSON.

[*Name of Court.*]

[*Venue.*]

E F being duly sworn, says: That he is the owner of [or has the right to the possession of] [describe the property] which has been taken possession of by you as sheriff, under a writ of attachment as such in the above entitled action, and that such ownership [or right of possession] is on the grounds that [state

the grounds of such ownership, or right of possession] and affiant claims said property on said grounds.

[*Jurat.*] E F.

Should such claim be so made, the sheriff is not bound to keep the property or deliver the same to the plaintiff unless plaintiff give to the sheriff, on demand by the sheriff on plaintiff or his agent, an undertaking of indemnity by two sufficient sureties, which may be in accordance with the following form:

FORM NO. 105.

UNDERTAKING ON BEHALF OF PLAINTIFF ON A CLAIM TO PROPERTY BY A THIRD PERSON.

[*Name of Court.*]

The plaintiff in this action having claimed possession of the following property, [describe it] and the plaintiff by proceedings in this action having caused J K, the sheriff of the county of ———, in this state, to take said property from the possession of the defendant C D, and one E F having claimed that he is the owner [or has the right of possession] of such property, and having made an affidavit that he is the owner [or has the right of possession] thereof, and having served the same on J K, said sheriff, and J K, said sheriff, having demanded that he be indemnified against said claim of said E F,

NOW THEREFORE, we, ——— and ———, in consideration of the premises, and to indemnify J K, said sheriff, from loss by reason of said claim, undertake in the sum of —— dollars, and promise J K, said sheriff, that A B, the plaintiff in said action, will indemnify J K, said sheriff, against said claim, and against all loss and damage he may sustain by reason thereof; and if said plaintiff fail to do so, we will pay to said J K, all loss and damage he may sustain by reason of such claim, not exceeding said sum of —— dollars.

[*Date.*] *Signatures.*

If no such claim be made, or if made, if such undertaking of indemnity be given, and if the defendant does not claim a return of the property within five days after notice of the taking of the property by the sheriff, by giving the proper undertaking for that purpose; or if the return be so required, but the sureties on such undertaking do not justify on notice, the sheriff must deliver the property to the plaintiff upon receiving the fees of the sheriff for the taking of the property, and his necessary expenses in keeping the same.

ATTACHMENT.

In California, and in some other of the code states, the plaintiff in an action on a contract for the direct payment of money, may at the time of the issuing of the summons in the action, or at any time afterward, have the property of the defendant, or of one or more of several defendants, attached as security for the satisfaction of any judgment that may be recovered by the plaintiff in the action, unless the defendant, whose property is sought to be attached give security by an undertaking, as provided in the Code of Civil Procedure.

Code of Civil Procedure, sections 537, 540.

FORM NO. 106.

AFFIDAVIT FOR WRIT OF ATTACHMENT WHEN CONTRACT WAS MADE, OR IS PAYABLE IN THIS STATE.

[*Name of Court.*]

[*Venue.*]

A B being duly sworn, deposes and says: That he is the plaintiff in this action; [or that he makes this affidavit on behalf of the plaintiff in this action] that the defendant in this action is indebted to the plaintiff therein in the sum of —— dollars over and above all legal set-offs and counter claims upon an express [or implied] contract, for the direct payment of money, namely, upon a contract; [state in substance what the contract is] that such contract was made [or is payable] in this state, and that the payment of the same has not been secured by any mortgage or lien upon real or personal property, or by any pledge of personal property; [or that the payment of the same was originally secured by a mortgage [or lien] upon real [or personal] property; [or by a pledge of personal property] and that such security has, without any act of the plaintiff or the person to whom the security was given, become valueless.] That the attachment is not sought, and the action is not prosecuted, to hinder, delay or defraud any creditor of the defendant.

[*Jurat.*] *Signature.*

FORM NO. 107.

AFFIDAVIT FOR ATTACHMENT AGAINST A NON RESIDENT WHEN THE CONTRACT WAS NOT MADE OR IS NOT PAYABLE IN THIS STATE.

[*Name of Court.*]

[*Venue.*]

A B being duly sworn, deposes and says: That he is the plaintiff in this action; [or that he makes this affidavit on behalf of the plaintiff in this action] that the defendant is indebted to the plaintiff therein in the sum of —— dollars, over and above all legal set-offs and counter claims; that the defendant is a non-resident of this state, and that the attachment is not sought, and the action is not prosecuted to hinder, delay or defraud any creditor of the defendant.

[*Jurat.*] *Signature.*

Upon receiving a proper affidavit for an attachment, but before issuing the writ, the clerk of the court must require a written undertaking on the part of the plaintiff in a sum not less than two hundred dollars, and not exceeding the amount claimed by the plaintiff, with sufficient sureties, which must be substantially according to the following form:

FORM NO. 108.

UNDERTAKING ON ATTACHMENT.

[*Name of Court.*]

The plaintiff having applied [or being about to apply] for the issuance of a writ of attachment in this action, and the clerk of the court having required before the issuance of said writ an undertaking on behalf of plaintiff, with sufficient sureties, in the sum of —— dollars,

NOW THEREFORE, in consideration of the premises, and of the issuance of such writ, we, A B, the plaintiff in the action, [or J K on behalf of the plaintiff in the action] as principal, and ——— and ———, as sureties, undertake and promise the defendant, and are bound to him in the sum of —— dollars, to the effect that if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all

damages which he may sustain by reason of the attachment, not exceeding said sum of —— dollars.

[*Date.*] *Signature.*

[Affidavit showing the sufficiency of the sureties as in form 131.]

Within five days after the service of the summons in the action, the defendant may except to the sufficiency of the sureties to the undertaking, and if he does so, the sureties or others in their place, must upon notice to the defendant, of not less than two, nor more than five days, justify before a judge or county clerk, in the same manner as upon bail on arrest, and if they or such other sureties fail to do so, the writ of attachment will be vacated. (See forms Nos. 96 and 97.)

The defendant, to prevent his property from being attached and held by the sheriff under the writ of attachment, may give to the sheriff security by the undertaking of two sufficient sureties, which may be according to the following form:

FORM NO. 109.

UNDERTAKING TO INDEMNIFY SHERIFF.

[*Name of Court.*]

A B as the sheriff of the county of ——, in this state, being about to attach the property of the defendant in this action, by virtue of a writ of attachment issued therein,

NOW, THEREFORE, in consideration of the premises, and for the purpose of giving security and to prevent the levy of such attachment, we, ——— and ——— undertake and promise the plaintiff in this action, and are bound to him in the sum of —— dollars; [being an amount sufficient to satisfy plaintiff's demand, besides costs, or an amount equal to the value of the property about to be attached] that the defendant will satisfy any judgment which the plaintiff may recover against him in the action.

[*Date.*] *Signatures.*

An affidavit showing the sufficiency of sureties should be under or attached to the undertaking, as in form No. 131.

If perishable property be attached, it may be sold by the sheriff without any order of the court, or of a judge thereof; and the net proceeds retained by the sheriff in place of the perishable property, so attached.

In case the interest of the parties to the action will be subserved by a sale of any of the property attached, and this satisfactorily appears to the court, or to a judge thereof, by the stipulation of parties, or by affidavit, or other evidence in the action, the court or a judge thereof, may order such property sold in the same manner as under execution, and the proceeds to be deposited in court to abide the judgment in the action.

FORM NO. 110.

ORDER OF THE COURT, OR OF A JUDGE THEREOF, FOR THE SALE OF ATTACHED PROPERTY.

[*Name of Court.*]

It appearing to the satisfaction of the court [or to Hon. ———, judge of the court] from the stipulation of the attorneys of the parties to the action, [or from affidavits, or from evidence, describing what it was] that the interest of the parties to the action will be subserved by a sale of the following described personal property attached in the action, namely: [Describe such property.]

IT IS ORDERED that said property so attached be sold by the sheriff who attached the property in the same manner as property is sold under an execution; and that the proceeds of the sale be deposited in court to abide the judgment in the action.

[*Date.*] ————————,

Judge.

Such an order can be made only upon notice to the adverse party, or his attorney, in case such party has been personally served with the summons in the action, or has made a general appearance by an attorney therein.

Should a person not a party to the action, claim the property attached as his property, he should make such claim by an affidavit, similar to the affidavit indicated by form No. 104, and if such claim be so made, and the plaintiff be notified of such claim, and a bond of indemnity be demanded of him by the sheriff, the sheriff is not bound to keep, under the writ of attachment, the property so claimed, unless the plaintiff give to him a bond of indemnity similar to the one as indicated by form No. 105. (See sections 549, 689, Code of Civil Procedure.)

After a defendant has appeared in the action, he may apply to the court in which the action is pending, or to a judge thereof, upon reasonable notice to the plaintiff, for an order to discharge the attachment wholly, or in part, on giving an undertaking, as provided by statute.

FORM NO. 111.

UNDERTAKING GIVEN TO PROCURE AN ORDER TO DISCHARGE AN ATTACHMENT.

[*Name of Court.*]

J K, the sheriff of ——— county, in this state, having, under and by virtue of a writ of attachment issued in this action, attached property of said C D, the [or a] defendant in the action, which property is described as follows, namely: [describe

it] and said defendant having applied to said court, [or to Hon. ———, judge of said court] upon reasonable notice to plaintiff, for an order to release said property from said attachment; and said court [or said judge] having required before such order was made, an undertaking on behalf of said defendant, and having fixed —— dollars as the sum for which such undertaking must be given;

NOW, THEREFORE, in consideration of the premises, and for the purpose of having such order made, we, ——— and ———, residents and freeholders [or householders] in the state of California, undertake, on behalf of said defendant, and promise the plaintiff, and are bound to him in said sum of —— dollars, to the effect that in case the plaintiff recover judgment in the action, the defendant will, on demand, redeliver the attached property so released to the proper officer, to be applied to the payment of the judgment; or in default thereof, that the defendant, and we, his sureties, will, on demand, pay to the plaintiff the full value of the property released.

[*Date.*] *Signatures.*

The court or judge is to fix the amount for which such undertaking must be given, and in case the plaintiff require it, the sureties must justify in manner similar to the justification of sureties to an undertaking of bail. (See form No. 97 et seq.)

On the justification of such sureties, when required, or if such justification be not required, the court, or judge thereof, will make an order releasing from the writ of attachment the attached property. The sureties should in any case make the affidavit showing their sufficiency as such sureties, as in form No. 131.

FORM NO. 112.

ORDER RELEASING FROM ATTACHMENT, ATTACHED PROPERTY.

[*Name of Court.*]

C D, the defendant [or one of the defendants] in this action, having applied for the release of property attached in the action, and an undertaking having been given in behalf of C D, said defendant [or one of the defendants] in this action, as required by the court [or Hon. ———, judge of the court] to obtain an order for the release from attachment of the property of said defendant C D, and which has been attached under a

writ of attachment issued in this action, and the sureties to such undertaking having justified; [or the justification of said sureties having been waived by the plaintiff in the action]

IT IS ORDERED that the following described property of the defendant C D, namely: [describe the property] which has been attached under a writ of attachment issued in this action, be and the same is released from such attachment.

[*Date.*]

———————,

Judge.

A defendant, on reasonable notice to the plaintiff, may move the court or a judge thereof for a discharge of an attachment on the ground that the writ was improperly or irregularly issued.

If such motion be made on affidavits, but not otherwise, the plaintiff may oppose the same by affidavits, or other evidence, in addition to that on which the writ of attachment was issued.

FORM NO. 113.

ORDER DISCHARGING AN ATTACHMENT, IMPROPERLY OR IRREGULARLY ISSUED.

[*Name of Court.*]

It appearing to the court [or to the Hon. ———, judge of said court] that the writ of attachment in this action was improperly [or irregularly, or both] issued,

IT IS ORDERED that said writ of attachment be discharged.

[*Date.*]

———————,

Judge.

INJUNCTION.

The plaintiff in an action has a right to have a preliminary or interlocutory injunction granted by the court or by a judge thereof, upon a showing by the complaint, if verified, or by affidavit of facts which entitle the plaintiff to such injunction. The preliminary injunction can only be granted upon the giving of an undertaking on the part of the plaintiff, with sufficient sureties, unless the plaintiff be the people of the state, a county, a municipal corporation, or a married woman in an action against her husband.

FORM NO. 114.

UNDERTAKING FOR A PRELIMINARY INJUNCTION.

[*Name of Court.*]

The plaintiff having applied for an injunction in this action, and the judge of the court having fixed the sum of —— dollars as the amount for which this undertaking should be given,

NOW, THEREFORE, in consideration of the premises and of the granting of the injunction, we, A B, the plaintiff, as principal, and ——— and ———, as sureties, undertake and promise the defendant C D, and are bound to him in said sum of —— dollars, to the effect that the plaintiff will pay to the defendant C D, the party enjoined, such damages not exceeding said sum of —— dollars, as such party may sustain by reason of the injunction, if the court finally decide that the plaintiff was not entitled thereto.

[*Date.*] *Signatures.*

Affidavit thereto of sureties, showing their sufficiency, as in form No. 131.

If the defendant, within five days after the service of the injunction, except to the sufficiency of the sureties, they, or others in their place, on not less than two nor more than five days' notice to defendant, must justify before a judge of the court, or county clerk, in the same manner as upon bail on arrest, as in form No. 97 et seq.

The court, or judge, if he deem it proper, may, before, granting an injunction, order notice to be given to a defendant to show cause why the injunction should not be granted, and may in the meantime restrain the defendant; and if this be done, an undertaking may be given, reciting the facts, by reason of which the undertaking is given; and with such recital the foregoing form may, with proper changes, be used.

If an injunction be granted without notice to a defendant, he may on reasonable notice to plaintiff, apply to the judge who granted the injunction, or to the court, to dissolve or modify the same. If the application be made upon affidavits, on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits, or other evidence, in addition to that on which the injunction was granted.

FORM NO. 115.

ORDER DISSOLVING OR MODIFYING INJUNCTION.

[*Name of Court.*]

Reasonable notice having been given to the plaintiff of a motion to dissolve [or modify] the injunction heretofore granted in this action, and it satisfactorily appearing to the court [or to Hon. ———, judge thereof] that there is not sufficient ground for said injunction,

IT IS ORDERED that said injunction be dissolved [or it satisfactorily appearing that the extent of said injunction is too great, it is ordered that said injunction be modified, stating how it is modified.]

[*Date.*] ————,

Judge.

RECEIVERS.

The statutes of a state prescribe the cases in which a receiver may be appointed.

If a receiver be appointed upon an ex parte application, the court, or a judge thereof, before making the order may require that an undertaking be given in a sum fixed by the court.

FORM NO. 116.

UNDERTAKING FOR THE APPOINTMENT OF A RECEIVER.

[*Name of Court.*]

The plaintiff in the action having applied to said court [or to the Hon. ———, judge thereof] for the appointment of a receiver, and said court [or judge] having fixed the sum of —— dollars for which an undertaking must be given before such appointment would be made;

Now, THEREFORE, in consideration of the premises, and of such appointment, we, ———, the plaintiff, as principal, and ——— and ———, as sureties, undertake and promise the defendant C D, and are bound to him in said sum of —— dollars, to the effect that said applicant will pay to the defendant C D all damages not exceeding said sum of —— dollars, which he may sustain by reason of the appointment of such receiver, and the entry by him upon his duties, in case said plaintiff shall have procured such appointment wrongfully, maliciously, or without sufficient cause.

[*Date.*] *Signatures.*

Affidavit thereto of sureties as in form No. 131.

Before entering on the discharge of his duties as receiver, the person appointed as such receiver should subscribe, take and file an oath as receiver.

FORM NO. 117.

RECEIVER'S OATH.

[*Name of Court.*]

[*Venue.*]

A B, who has been appointed a receiver in this action, being duly sworn, deposes and says: That he will perform his duties as receiver in the action faithfully.

[*Jurat.*] *Signature.*

The receiver, before he enters upon the discharge of his duties, must file an undertaking with one or more sureties, approved by the court or judge, in such sum as the court or judge may direct.

FORM NO. 118.

UNDERTAKING OF A RECEIVER.

[*Name of Court.*]

A B having been appointed a receiver in this action, and the court [or the Hon. ———, judge of said court] having directed that said A B, before he enters on the discharge of his duties as such receiver, execute with sufficient sureties an undertaking in the sum of —— dollars;

Now, THEREFORE, in consideration of the premises, we, A B and ——— and ———, as sureties, undertake and promise and are bound in said sum of —— dollars to ———, to the effect that he, the said A B, will faithfully discharge the duties of receiver in the action, and obey the orders of the court therein.

[*Date.*] *Signatures.*

There should be an affidavit of the sureties as in form No. 131, showing that they are sufficient as sureties.

In some cases the undertaking may be to the state of California, Political Code, section 982.

The court in which an action is pending may order that a party to an action deposit in court or deliver to another party certain property capable of manual delivery.

FORM NO. 119.

ORDER FOR DEPOSIT IN COURT, OR THE DELIVERY TO ANOTHER PARTY, OF MONEY OR PROPERTY.

[*Name of Court.*]

It appearing to the satisfaction of the court that ——— has in his possession [or under his control] the sum of —— dollars [or the following described property, describing it] which is the subject of litigation in this action, and which is held by him as trustee for ——— [or which belongs to, or is due to] ———, on motion of ——— Esq., the attorney for ———, IT IS ORDERED that said ——— deposit said money in court, [or deliver the said property to ———], upon the following conditions, [describe them] subject to the further direction of the court.

[*Date.*] ———,

Judge.

FORMS OF THE EVIDENCE OF SERVICE OF NOTICES AND OTHER DOCUMENTS, AND OF AFFIDAVITS SHOWING THE SUFFICIENCY OF THE SURETIES TO UNDERTAKINGS AND BONDS.

During the progress of the proceedings in civil remedies it frequently becomes necessary for a party to an action, or to a proceeding, to obtain an order of the court, or of a judge thereof.

The application for such order is a motion, and in many cases written notice of the motion must be given; and when such written notice is required to be given, evidence of the service of such notice should be presented to the court or judge, unless the presentation of such evidence is waived by the adverse party. In many cases copies of papers are to be served with such notice, and when this is the case, the evidence which shows the service of the notice should also show that such copies have been served. If the service be on an attorney, such evidence may be by a written admission of such service, or by an affidavit showing that such service had been made. When the service is not on an attorney, the evidence of the service should be an affidavit.

FORM NO. 120.

ADMISSION BY AN ATTORNEY OF THE SERVICE OF A NOTICE.

I admit service of the notice of which the within is a copy this — day of ——.

G H,
Attorney for Plaintiff.

FORM NO. 121.

ADMISSION BY AN ATTORNEY OF RECEIPT OF NOTICE.

I received the notice of which the within is a copy this — day of ——.

G H,
Attorney for Plaintiff.

FORM NO. 122.

ADMISSION BY AN ATTORNEY OF THE SERVICE OF A NOTICE AND OF COPIES OF PAPERS.

I admit service of [or I received] the notice of which the within is a copy, and of a copy thereto attached of the affidavit of A B, [or of other paper, stating what it is] which is attached

to the within copy of the notice, this — day of —— at ——— in this state.

G H,
Attorney for Plaintiff.

FORM NO. 123.

AFFIDAVIT OF THE SERVICE OF NOTICE.

[*Venue.*]

G H being duly sworn, says: That he is the attorney of the plaintiff in the action named in the notice, of which the within is a copy, and that he served said notice on I J, the attorney for the defendant in the action therein named by delivering the same to him personally on the — day of —— at ———, in this state.

[*Jurat.*] G H.

FORM NO. 124.

AFFIDAVIT OF SERVICE OF NOTICE AND COPIES OF PAPERS THERETO ATTACHED, ON AN ATTORNEY.

[*Venue.*]

G H, being duly sworn, says: That he is the attorney of the plaintiff in the action named in the notice, of which the within is a copy; and that he served said notice and a copy of the affidavit of A B [and a copy of the order of a judge of the court], attached to said notice, and which affidavit [and order] are attached to the within copy of said notice on I J, the attorney of C D, the defendant in said action, by delivering the same to said I J personally on the — day of ——— at ———— in this state.

G H,

[*Jurat.*]

FORM NO. 125.

AFFIDAVIT OF SERVICE OF NOTICE ON AN ATTORNEY WHEN NO ONE WAS IN HIS OFFICE AT THE TIME OF THE SERVICE.

[*Venue.*]

G H, being duly sworn, says: That he is the attorney of the plaintiff in the action named in the notice of which the within is a copy, and that he served said notice on I J, Esq., the attorney for defendant in said action, by leaving the same in the office of said I J at ———, in this state, on the — day of ——, between the hours of eight in the morning and six in the afternoon of that day, on the desk of said I J, which was a conspicuous place in his said office; and that there was no one in his said office at the time of such service.

[*Jurat.*] G H.

FORM NO. 126.

AFFIDAVIT OF SERVICE OF NOTICE ON AN ATTORNEY WHEN HIS OFFICE WAS IN CHARGE OF A CLERK.

[*Venue.*]

G H, being duly sworn, says: That he is the attorney of the plaintiff in the action named in the notice of which the within is a copy, and that he served said notice on I J, Esq., the attorney for the defendant named in said action, by delivering the same in the office of said I J at ——— in this state, to, and leaving it with E F, who was at the time of such service the clerk [or had charge of the office] of said I J, and the said I J was absent from his office at the time of said service.

[*Jurat.*] G H.

FORM NO. 127.

AFFIDAVIT OF SERVICE OF NOTICE ON AN ATTORNEY WHEN HIS OFFICE IS CLOSED.

[*Venue.*]

G H, being duly sworn, says: That he is the attorney of the plaintiff in the action named in the notice of which the within is a copy, and that he served said notice on I J, the attorney of the defendant named in said action at ——— in this state, on the — day of ——, by then leaving said notice at the residence of said I J, at said town [or city] of ———, with E F, who was then over —— years of age, and was a person of discretion, and who resided at the said residence of said I J at the time of such service; and the office of said I J was not open at the time of such service and his office was then in the county in which his residence then was.

[*Jurat.*] G H.

FORM NO. 128.

AFFIDAVIT OF SERVICE OF NOTICE BY MAIL ON AN ATTORNEY.

[*Venue.*]

G H, being duly sworn, says: That he is the attorney of the plaintiff in the action named in the notice of which the within is a copy, and that he served said notice on I J, the attorney for the defendant in that action, on the — day of ———, by depositing said notice on said — day of ——— in the postoffice at city of ——— in the state of California, which city of ——— was then the place of residence of affiant, enclosed in a sealed envelope directed to said I J at the city of ———, California, which city was the then place of residence of said I J, and paid the postage thereon, and that said I J had no office in said city of ——— at that time, and that there was then and has been ever since a regular communication by mail between said cities.

[*Jurat.*] G H.

If any paper be attached to the notice served this should be shown as in form No. 124.

The service may be made by the clerk of the attorney, or by any one

employed by him for the purpose of making such service, and the affidavit should show that the service was made by said clerk, or by the person so employed.

FORM NO. 130.

FORM OF AFFIDAVIT OF SERVICE ON A PERSON NOT AN ATTORNEY.

[*Venue.*]

A B, being duly sworn, says: That he served the notice [or other paper, describing it] of which the within is a copy, at ——— and on the — day of ——— on C D by delivering the same to him personally [or by leaving the notice, or such other paper] at the residence of said C D at said town [or city] of ——— with E F, who was then over the age of —— years, and of discretion, and who resided at the said residence of said C D at the time of such service.

[*Jurat.*] A B.

A service by mail is complete on such deposit of the notice or other paper in the postoffice; but if within a given number of days after such service, a right may be exercised, or an act may be done, the time within which such right may be exercised or act done, is extended one day for every twenty-five miles distance between the place of deposit, and the place of address; such extension, however, is not to exceed ninety days in all.

The manner of the service of a summons, writ, or order, in any civil suit or proceeding, and of all other papers requiring service, by a telegraphic copy thereof, and the evidence of such service, is prescribed by section 1017 of the Code of Civil Procedure.

FORM NO. 131.

FORM OF AN AFFIDAVIT SHOWING THE QUALIFICATION AND SUFFICIENCY OF SURETIES TO A BOND OR UNDERTAKING.

[*Venue.*]

A B and C D, being severally duly sworn, each for himself says: That he is a resident and householder [or freeholder] within the state of California, and is worth the sum [or sums] [state said sum or sums] specified in the foregoing undertaking [or bond], over and above all of his just debts and liabilities, exclusive of property exempt from execution.

[*Jurat.*] *Signatures.*

If the bond or undertaking exceeds three thousand dollars, there may be

more than two sureties to such bond or undertaking, and in such case, each surety can state in the affidavit the amount which he is worth over and above his just debts and liabilities, exclusive of property exempt from execution; and if the whole amount specified in the bond or undertaking be equivalent to that of two sufficient sureties, the bond or undertaking, if otherwise good, will be valid.

FORM NO. 132.

FORM OF AFFIDAVIT OF SURETIES ON A BOND OF A NOTARY PUBLIC OR STATE OFFICER.

[*Venue.*]

A B and C D, being severally duly sworn, each for himself says: That he is a resident [or freeholder] within the state of California, and is worth the sum [state it] specified in the foregoing bond in unencumbered property within the state of California, over and above all of his just debts and liabilities, exclusive of property exempt from execution.

[*Jurat.*] *Signatures.*

FORMS AND PROCEEDINGS ON THE PART OF A DEFENDANT AFTER SERVICE OF SUMMONS AND BEFORE ANSWER.

A defendant must, after the service of a summons in an action on him, and within the time prescribed by law for answering the complaint in the action, answer such complaint, or demur thereto, (unless such time be extended,) or his default may be entered.

If the attorney of the defendant has not appeared in the action by answer or demurrer, he should give notice in writing of his appearance, which may be according to the following form:

FORM NO. 133.

NOTICE OF APPEARANCE IN AN ACTION.

[*Name of Court.*]

You will take notice that I appear for the defendant C D, in this action.

[*Dated.*]

I J,
Attorney for the Defendant.

To G H, Esq.,
Attorney for Plaintiff.

If the appearance for the defendant is not intended to be a general appearance, but it is intended to be an appearance for a special purpose, the notice of appearance may be according to the following form:

FORM NO. 134.

NOTICE OF APPEARANCE FOR A SPECIAL PURPOSE.

[*Name of Court.*]

You will take notice that I appear in this action for the defendant, C D, for the special purpose of [state the special purpose.]

[*Date.*]

I J,
Attorney for the Defendant.

To G H, Esq.,
Attorney for Plaintiff.

Evidence of service of these notices may be, and should be, either by the admission of the attorneys for plaintiff, or by affidavit, and it should be

attached to, or endorsed on a copy of the notice, and such copy should be then filed in the action.

The attorney for defendant should ascertain whether it would be necessary before answering or demurring to have the time to answer as stated in the summons extended; this may be done by stipulation of counsel, or by an order of a judge of the court, which order may be according to the following form:

FORM NO. 135.

ORDER EXTENDING TIME TO ANSWER.

[*Name of Court.*]

Good cause appearing therefor, it is ordered that the defendant, C D, have to and including the — day of ——— to answer the complaint in this action.

[*Date.*] ———————,
Judge.

The order, if obtained, should be filed in the action; a motion, or the pendency thereof, does not extend the time to answer or demur. In California, section 1054 of the Code of Civil Procedure prescribes acts to be done, and provides in what cases the time for doing which, can be extended by an order of a judge, and the time for which the extension can be made.

Before demurring or answering the defendant may desire to have the summons, or the service thereof quashed, and in such case his appearance in the action should be special, for that purpose. He may desire to have irrelevant or redundant matter stricken out of the complaint; he may wish to have a copy of the account sued on, if the action be for an indebtedness on an account. He may wish to have an inspection of the written instrument sued on, when a copy thereof is annexed to, or is set out in the complaint, in which case, unless he is denied an inspection of such instrument, his answer must be verified, although the complaint be not verified; and he may, in California, and perhaps in other states, wish to have a non-resident plaintiff, or a foreign corporation plaintiff give security for costs; and if the action be not commenced in the proper county for the trial of the action he may wish to have the action transferred to the proper county for trial.

FORM NO. 136.

NOTICE OF MOTION TO QUASH SUMMONS, OR ITS SERVICE.

[*Name of Court.*]

You will take notice that defendant will move the court at the court room [No. —] thereof on the — day of ——— at — o'clock — m., or as soon thereafter as counsel can be heard, to quash the summons in this action, [or to set aside the service of the summons in this action] on the ground that said summons is defective; [or on the ground that the service

of the summons was not properly made] such motion will be made on the summons in the action; [or on the summons and the evidence of the service thereof, endorsed on, [or attached to] said summons] and on affidavits, copies of which are attached to this notice.

[*Date.*]

I J,
Attorney for Defendant.

To G H, Esq.,
Attorney for Plaintiff.

Evidence of the service of such notice and of the copies of the affidavits attached thereto, should be filed in the action, with a copy of the notice.

FORM NO. 137.

NOTICE OF MOTION TO STRIKE OUT PORTIONS OF COMPLAINT.

[*Name of Court.*]

You will take notice that the defendant in this action will move said court at the court room [No. —] thereof on the — day of —— at — o'clock — m., or as soon thereafter as counsel can be heard, to strike out as irrelevant, and as redundant the following portion of the complaint: [Describe the portions to be stricken out.] the motion will be made on the complaint in the action.

[*Date.*]

I J,
Attorney for Defendant.

To G H, Esq.,
Attorney for Plaintiff.

Evidence of the service of the notice should be filed.

FORM NO. 138.

DEMAND FOR A COPY OF ACCOUNT SUED ON.

[*Name of Court.*]

The defendant in this action demands a copy of the account sued on in this action.

[*Date.*]

I J,
Attorney for Defendant.

To G H, Esq.,
Attorney for Plaintiff.

Evidence of service of a copy of this demand and the demand should be filed.

FORM NO. 139.

NOTICE OF MOTION FOR ORDER PRECLUDING PLAINTIFF FROM GIVING EVIDENCE OF AN ACCOUNT SUED ON.

[*Name of Court.*]

You will take notice that defendant will move said court at the court room thereof on the — day of ——— at — o'clock — m., or as soon thereafter as counsel can be heard, that plaintiff be precluded from giving evidence of the account sued on in this action; said motion will be made on the papers in this action, and on an affidavit, a copy of which is herewith served; and on the ground that a copy of said account has been demanded by the defendant, and has not been given to him.

[*Date.*]

I J,
Attorney for Defendant.

To G H, Esq.,
Attorney for Plaintiff.

A copy of an affidavit showing the facts which do not appear from the papers in the action, and which show that plaintiff should be precluded from giving evidence of the account sued on, should be served with the notice. Evidence of the service of the notice and of a copy of the affidavit should be filed.

FORM NO. 140.

NOTICE REQUIRING SECURITY FOR COSTS.

[*Name of Court.*]

You will take notice that the defendant requires security from plaintiff, who is a non-resident of this state, [or is a foreign corporation] for defendant's costs and charges in this action, which may be awarded against such plaintiff.

[*Date.*]

I J,
Attorney for Defendant.

To G H, Esq.,
Attorney for Plaintiff.

Should the non residence of the plaintiff (or that plaintiff is a foreign corporation) not appear on the face of the complaint, such fact should be shown by affidavit, a copy of which should be served with the notice of motion for an order staying proceedings until such security be given.

FORM NO. 141.

NOTICE OF MOTION TO STAY PROCEEDINGS IN THE ACTION UNTIL SUCH SECURITY BE GIVEN.

[*Name of Court.*]

You will take notice that defendant will move said court at the court room thereof on the — day of ——— at — o'clock — m., or as soon thereafter as counsel can be heard, for an order staying proceedings in this action until plaintiff give security to defendant for his costs and charges which may be awarded to him in the action. The motion will be made on the complaint in the action, [and on an affidavit, a copy of which is herewith served] and on the ground that plaintiff is a non-resident of this state, [or is a foreign corporation.]

[*Date.*]

I J,
Attorney for Defendant.

To G H, Esq.,
Attorney for Plaintiff.

If the court be satisfied on the hearing that plaintiff is a non-resident, or a foreign corporation, the order asked for will be made.

In California, the amount of the first security is $300.00. Additional security may be required if it be shown that the first security given is not sufficient; and the Code of California provides for the dismissal of the action if the security be not given. Code of Civil Procedure, section 1037.

The defendant may also wish to have an inspection and a copy of entries of account in a book, or of a document, or paper, in the possession of the plaintiff, or under his control, containing evidence relating to the merits of the action, or the defense therein before answering in the action, and if he is refused such inspection, he can obtain an order of the court, or of a judge thereof, that he be given such inspection and the right to take such copy.

FORM NO. 142.

AFFIDAVIT FOR ORDER FOR INSPECTION OF A BOOK OF ACCOUNT, OR OF A PAPER, AND TO TAKE A COPY THEREOF.

[*Name of Court.*]

[*Venue.*]

I J, being duly sworn, says: That he is the attorney for the defendant in this action; that the plaintiff has in his possession [or under his control] a book containing accounts, [or a document, describing it] [or paper, describing it] relating to the transactions alleged in the complaint in this action, and which contains evidence relating to the defense in the action; that he has, for defendant, requested plaintiff to give him an inspection of such entries in said book [or of said document] [or of said paper], and permission to take a copy thereof, unless plaintiff would give him inspection and a copy thereof;

That plaintiff has absolutely refused to give him such inspection and copy, and has absolutely refused to give permission to take such copy.

[*Jurat.*] I J.

FORM NO. 143.

NOTICE OF MOTION FOR AN ORDER FOR INSPECTION OF AND A COPY OF ENTRIES IN A BOOK, OR OF A PAPER OR DOCUMENT.

[*Name of Court.*]

You will take notice that the defendant will move said court at the court room [No. —] thereof, [or Hon. ———, judge

thereof, at his chambers], on the — day of ——, at — o'clock — m., or as soon thereafter as counsel can be heard, for an order that plaintiff give to defendant inspection of entries in a book [or of a document or paper] relating to transactions mentioned in the complaint in this action, and which contains evidence relating to the defense in this action. Said motion will be made on the complaint in this action, and on an affidavit, a copy of whch is herewith served; and on the ground that such inspection and copy is necessary for the defense of the defendant in this action.

[*Date.*]

I J,
Attorney for Defendant.

To G H, Esq.,
Attorney for Plaintiff.

On such motion, the court or judge will, if good cause therefor appear, grant the order asked for; and a certified copy thereof should be served on plaintiff.

The plaintiff is entitled to a like order on a like showing, in case the entries in the book, document, or paper, in the possession or control of a defendant, contain evidence relating to the merits of the action.

The defendant may wish to take the deposition of plaintiff before answering. This may be done, as hereinafter shown.

FORM NO. 144.

DEMAND TO HAVE INSPECTION OF AN ORIGINAL INSTRUMENT.

[*Name of Court.*]

The defendant desires to controvert the genuineness and due execution of the instrument in writing, a copy of which purports to be contained in [or is annexed to] the complaint in this action; and he demands an inspection of the original.

[*Date.*]

I J,
Attorney for Defendant.

To G H, Esq.,
Attorney for Plaintiff.

This demand should be served by copy, and the original demand, with evidence of the service of the copy, endorsed thereon, should be filed.

If the defendant wishes to have the action transferred to the proper county for trial, he must at the time when he appears and answers or demurs, file a demand, affidavits of residence and merits, with his answer or demurrer.

FORM NO. 145.

AFFIDAVITS OF RESIDENCE, AND OF MERITS, AND A DEMAND FOR A CHANGE OF THE PLACE OF TRIAL.

[*Name of Court.*]

[*Venue.*]

C D, being duly sworn, says: That he is the defendant in this action, and he was at the commencement of this action [and is] a resident of the county of ———, in the state of California; and that he has fully and fairly stated the case to I J, his counsel, who resides at ———, in the state of California, and he has a good and substantial defense on the merits to the action, as he is advised by his said counsel after such statement, and verily believes, and he demands a change of the place of the trial of this action to said county of ———, the proper county for the trial of the action.

[*Jurat.*] C D.

FORM NO. 146.

NOTICE OF MOTION TO CHANGE THE PLACE OF TRIAL OF AN ACTION, OR SPECIAL PROCEEDING.

[*Name of Court.*]

You will take notice that the defendant in this action will move said Superior Court, at the court, room [No. —] thereof on the — day of —— at — o'clock — m. of that day, or as soon thereafter as counsel can be heard, to change the place of trial of this action to the county of ———, in the state of California, on the ground that said county is the proper county for the trial of the same; the motion will be made on the complaint in the action, and on affidavits of residence, and of merits and on a demand for a change of the place of trial, and on defendant's demurrer [or answer] to the complaint in the action, copies of which are hereto attached and served on you.

[*Date.*]

I J,
Attorney for Defendant.

To G H, Esq.,
Attorney for Plaintiff.

This notice is not the demand for the change of the place of trial, mentioned in the Code of Civil Procedure.

If an answer be filed instead of a demurrer, the plaintiff can resist the motion, by affidavits showing that the convenience of witnesses, and the ends of justice would be promoted by retaining the action or proceeding for trial in the county in which the action was commenced. The court may, on motion based on affidavits showing facts which render such change proper, change the place of the trial of an action in the following cases, namely:

When there is reason to believe that an impartial trial cannot be had in the county in which the action is pending;

When the convenience of witnesses and the ends of justice would be promoted by the change;

When, for any cause, the judge is disqualified from acting, such change, other than a change on the ground that the action is not brought in the proper county, may be made on the motion of either of the parties to the action, if such motion be made within a reasonable time.

When the place of trial is asked to be changed, on any ground other than that of the residence of the defendant at the time of the commencement of the action, the action or proceeding should be, if changed for trial, changed to a county the parties agree upon; or if they do not agree, then to the nearest or most accessible court, where the like objection does not exist.

The cause should not be transferred to another court for trial on the ground of the convenience of witnesses until issues of facts to be tried are raised by the pleadings; and the affidavits for such change of trial for the convenience of witnesses should show the name and residence of each witness, and the substance of that which the moving party expects to prove by such witness.

Cook v. Pendergast, 61 Cal. 72.

Sloan v. Smith, 3 Cal. 413.

If notice should be given of the motion for a change of the place of trial, with this notice copies of affidavits should be served, showing facts upon which the moving party will rely; and the adverse party can serve on the moving party copies of affidavits, and file the originals, to show that the moving party is not entitled to a change of the place of trial of the action or proceeding.

FORMS FOR DEMURRER AND ANSWER.

The first pleading on the part of the defendant, should he desire to demur, is a demurrer to the complaint.

FORM NO. 147.

DEMURRER TO THE COMPLAINT.

[*Name of Court.*]

The defendant C D demurs to the complaint in this action on the grounds following:

I.

That the court has no jurisdiction of the person of the defendant, or of the subject of the action;

II.

That the plaintiff has not legal capacity to sue; [specify wherein.]

III.

That there is another action pending between the same parties and for the same cause; [specify the action.]

IV.

That there is a defect of parties plaintiff [or defendant] in that ——— should have been made a party plaintiff; [or ——— should have been made a party defendant] [or there is a misjoinder of parties plaintiff [or defendant] in that ——— is improperly joined as a party plaintiff in this action] [or that ——— is improperly joined as a party defendant in the action.]

V.

That several causes of action have been improperly united, in that an action on a contract is united to an action to recover specific personal property; [or state what other causes of action are improperly united in the complaint.]

VI.

That the complaint does not state facts sufficient to constitute a cause of action;

VII.

That the complaint is ambiguous in that [state wherein the

complaint is ambiguous] and the complaint is unintelligible in that [state wherein the complaint is unintelligible] and the complaint is uncertain in that; [state wherein the complaint is uncertain.]

I J,
Attorney for Defendant.

The defects which are grounds for a demurrer must appear on the face of the complaint, and should be specifically pointed out by the demurrer, except that, as a general rule, a demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action, need not specifically point out the particular defect, unless the facts are defectively stated.

The objection to the jurisdiction of the court, and that the complaint does not state facts sufficient to constitute a cause of action, is not waived by failure to demur; but other objections to the complaint, if the complaint on its face shows grounds by reason of such objection for demurrer thereto, are waived by failure to raise such objections by demurrer. The defendant may include in his demurrer either, or any, or all of the several grounds of demurrer mentioned in the foregoing form, and may demur to one or more causes of action stated in the complaint; if more than one cause of action is stated therein, and if the demurrer be to the whole complaint in the action, on the ground that it does not state facts sufficient to constitute a cause of action, and there be one good cause of action correctly stated in the complaint, the demurrer will be overruled.

Should a demurrer be sustained, the plaintiff should, if the complaint be amendable, be, by an order of the court, granted leave to amend, or to file an amended complaint within such time as the court may specify; and the amendment, or the amended complaint, must be served on the defendant, who must demur to, or answer the same, within such time as is prescribed by statute, or by an order of the court; or judgment by default may be entered as in other cases.

If the demurrer be overruled, the court may by order grant to the defendant leave to answer the complaint. In California the time to amend or answer runs from the time the plaintiff (or the defendant) is served with notice of the order granting leave to amend (or to answer), or otherwise has knowledge of the same.

After the demurrer has been disposed of by the trial court, or if there be no demurrer, then within the time prescribed by law, or given by stipulation of counsel, or granted by an order of the court, or of a judge thereof, the defendant must answer the complaint, or judgment by default may, in some cases, be entered against him. If the complaint in the action be unverified, unless on an instrument in writing, a copy of which is set out in, or attached to the complaint, the answer may be by a general denial. In all other cases the answer must contain specific denials of the allegations in the complaint, which are sought to be controverted and be verified.

If the defendant be an infant, incompetent, or insane person, he should answer by his guardian; or the court may on a proper application therefor, as provided by statute, appoint a guardian ad litem for him, and he should answer by the guardian ad litem so appointed.

Forms 2 and 4 show how such guardian ad litem should be appointed in California.

FORM NO. 148.

ANSWER BY GENERAL DENIAL TO AN UNVERIFIED COMPLAINT.

[*Name of Court.*]

The defendant C D answers the complaint in this action, and denies each and every allegation thereof.

I J,
Attorney for Defendant.

This general denial has not the effect of a plea of the general issue at common law; at common law evidence of many defenses could be introduced under the plea of the general issue, which cannot be introduced under a general denial.

The only evidence that can be introduced under a general denial is evidence to show that the material allegations of the complaint, or that some of the material parts thereof are not true.

At common law, a plea in abatement, or a plea showing that the plaintiff ought not to maintain his present action, if made, must be passed on by the court before a defendant enters his plea in bar, or to the merits. And at common law, a plea in bar, entered, before a plea in abatement was disposed of, was a waiver of such plea.

But under the code system a defendant can set out as many defenses in his answer as he may have, except defenses in abatement of the action, that are waived by failure to demur to the same when they appear on the face of the complaint. When the answer sets out a defense in abatement, as a general rule that defense should be disposed of before the issues raised by an answer in bar, or to the merits, are tried.

Under the code system the defendant may deny allegations of the complaint; he may state facts not appearing on the face of the complaint, which show that the action should be abated; he may state facts which would justify or excuse his acts complained of in the complaint; he may set out as a defense that if the plaintiff ever had a cause of action, the defendant has been discharged or released therefrom; he may set out in his answer as a counter claim against plaintiff, a cause of action arising out of the transaction set out in the complaint as the foundation of plaintiff's claim or connected with the subject of the action; and in an action arising upon a contract, he may allege as a counter claim any other cause of action which he has, which is upon a contract, and which existed at the commencement of the action; and when he seeks affirmative relief against any party relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court, subsequently, a cross complaint.

FORM NO. 149.

ANSWER TO AN ACTION ON AN ALLEGED WRITTEN CONTRACT, A COPY OF WHICH IS CONTAINED IN THE COMPLAINT.

[*Name of Court.*]

The defendant ———, answering the complaint in this action, admits that the signature ——— to the instrument in writing, on which this action is brought, is his genuine signa-

ture, and that it was delivered by defendant to plaintiff; but he alleges that plaintiff and defendant were at the time of the making of said signature and of the delivery of such instrument, intimate friends;

That plaintiff falsely stated to defendant that he, plaintiff, wished to borrow money for his own use, and that if defendant would make to him, plaintiff, said instrument in writing, he, plaintiff, could borrow money thereon; and that defendant would never be called on to pay the money, or any part thereof, which was payable by the terms of said instrument;

That induced by such statements, and believing such statements to be true, defendant signed said instrument in writing sued on in this action, and delivered the same to plaintiff, and there was and is no other consideration therefor;

[Or, that the defendant, at the time of such signature and delivery of said written instrument, was imprisoned by plaintiff, and then and there detained, and that by force and duress of imprisonment, and not otherwise, the defendant signed and delivered to plaintiff said instrument in writing; and there was and is no consideration therefor;]

[Or, that said instrument in writing was signed by the defendant and delivered to the plaintiff because the plaintiff threatened defendant that unless he, the defendant, signed said instrument and delivered the same, so signed, to plaintiff, plaintiff would injure the character of defendant by accusing him of committing the crime of larceny; [or state the particular crime] and in consequence of which, and in fear thereof, the defendant signed said instrument and delivered it so signed to plaintiff; and there was and is no consideration therefor;]

[Or, that the defendant and the plaintiff played together a gambling game of chance, called ———, upon credit; and at such game plaintiff won —— dollars from defendant; and for the money so won the defendant gave to plaintiff the instrument in writing mentioned in the complaint, and on which this action is brought; and there was not and is not any other consideration therefor;]

[Or, that heretofore, on or about the — day of —— ,at the county of ———, in this state, plaintiff informed defendant that E F, a friend of the defendant, had feloniously stolen, taken and

carried away a horse, the property of plaintiff; and the defendant, to compromise and settle said claimed felony, gave the said instrument in writing to plaintiff; and plaintiff did not inform against, nor prosecute, nor cause to be prosecuted said E F for said claimed felony; and there was and is no other consideration for said instrument in writing;]

[Or, that there was and is no consideration for the alleged instrument in writing, a copy of which is set out in the complaint, and on which this action is brought;]

[Or, that said instrument in writing, on which this action is brought, relates to real property, and at the time of the signing and delivery of said instrument in writing the defendant was a minor of the age of — years;]

[Or, that at the time of the signing by defendant, and the delivery of said instrument in writing, the defendant was of unsound mind, and thereby incapable of making said instrument in writing, and understanding the same, as the plaintiff then well knew.]

WHEREFORE the defendant demands judgment against plaintiff, that he take nothing by this action; that said instrument in writing be adjudged void and ordered to be delivered to defendant to be cancelled; and that defendant have and recover from plaintiff defendant's costs in this action.

I J,
Attorney for Defendant.

[*Duly verified.*]

FORM NO. 150.

ANSWER TO AN ACTION ON AN OBLIGATION, WHEN THE ANSWER CONTAINS DEFENSES IN ABATEMENT OF THE ACTION, AND OF RELEASE OR DISCHARGE OF THE CAUSE OF ACTION.

[*Name of Court.*]

The defendant C D, as a defense in the action, alleges:

That at the commencement of this action there was and now is another action pending in the ——— Court, [state the name of the court] between the same parties who are parties to this

action, and for the same cause of action, which is stated in the complaint in this action;

[Or, that the plaintiff before this action assigned the cause of action on which this action is brought to one E F, who thereupon became and still is the owner of said cause of action; and the plaintiff is not the real party in interest in the action.]

And for a further defense, defendant alleges:

That after making the contract mentioned in the complaint, and on which this action is brought, [or after the supposed grievances in the complaint mentioned, and before this action] namely, on the — day of ——, this defendant delivered to plaintiff, and plaintiff accepted and received from the defendant, [describe the property so delivered and received] in full satisfaction and discharge of said contract, and of all the damages and debt thereby arising; [or of said grievances and the damages in the complaint mentioned, and therein alleged.]

[Or, that after the accruing of the cause of action in complaint mentioned, and on which this action is brought, namely, on the — day of ——, the plaintiff and defendant mutually submitted the demand and claim sued on and all matters which are embraced in said supposed cause of action mentioned in the complaint, and other controversies, to the arbitration of ———, who, thereafter, and before this action, and before any withdrawal or attempted withdrawal of such submission, made and published their award on such submission, of which award the following is a copy: [Insert copy.] And said award has not been modified, nor set aside, but is still in force;]

[Or, that on the — day of ——, at the county of ———, in this state, in an action brought by the plaintiff in this action against the defendant in this action, in the ——— Court, [state the name of the court] for the same cause of action as that set forth in the complaint in this action said plaintiff recovered judgment, which was duly given and made against the defendant in this action for; [state the judgment] and said judgment has not been set aside, modified or reversed, and it remains in full force; [or said judgment has been fully satisfied by payment.]

[Or, that before this action, the plaintiff for value executed and delivered to the defendant a release under his hand and seal,

of which the following is a copy; [insert] by which the defendant was released and discharged from the alleged cause of action mentioned in the complaint, and sued on in this action;]

[Or, that before this action, and on the — day of —— defendant satisfied plaintiff's claim and demand sued on in this action by payment;]

[Or, that on the — day of —— defendant drew his bill of exchange on ——— at ——— for the sum of —— dollars, payable to plaintiff or order, —— months after said date, and delivered the same to plaintiff in payment and satisfaction of the claim and demand sued on in this action; and plaintiff received the same in payment and satisfaction of such claim and demand, and said bill of exchange was accepted by said ——— in writing endorsed on said bill; but said bill has never been presented for payment to said ———, but plaintiff holds the same; [or has disposed of the same for his own use and benefit.]

[Or, that after the accruing of the alleged indebtedness mentioned in the complaint, and sued on in this action, the defendant made to plaintiff, and plaintiff received from defendant, defendant's negotiable promissory note on the — day of ——, for the sum of —— dollars, bearing interest at the rate of — per cent. per annum, in payment and satisfaction of said claim and indebtedness sued on in this action; and plaintiff still holds said promissory note, [or has disposed of the same] for his own use and benefit;]

[Or, that after the promissory note sued on in this action was made, and before this action, on the — day of ——, it was mutually agreed between plaintiff and defendant, that defendant give to plaintiff his work and services as a ———; and that plaintiff would receive such work and services to the amount due and payable on said note in satisfaction thereof; and that defendant, afterwards, and before this action, and under and according to said agreement, did and performed work and services for the plaintiff as such ———, of the value of —— dollars, and to the full amount due and payable on said note, and thereby satisfied the same;]

[Or, that this defendant has duly performed the conditions of the contract sued on in this action on his part, as follows: [state acts of performance.]

[Or, that before this action, and on the — day of ——, at ———, this defendant tendered to plaintiff —— dollars in payment and satisfaction of the alleged claim and demand sued on in this action, but plaintiff then refused, and ever since has refused to receive the same; and that defendant was at the time of said tender and ever since has been ready and willing and able to pay plaintiff the same; and this defendant now brings the said sum of —— dollars into this court in this action, ready to be paid to plaintiff;]

[Or, that the plaintiff has not duly performed all of the conditions of the contract sued on, on his part, in that; [state wherein the plaintiff has not performed on his part such conditions.]

[Or, that by an instrument in writing made by plaintiff and defendant, and signed by both of them, on the — day of ——, and before this action, and of which instrument in writing the following is a copy, [insert copy] the alleged contract sued on in this action was rescinded, and that defendant has duly performed all the conditions of said instrument in writing on his part;]

[Or, that on the — day of ——, at ———, the United States District Court for the district of ———, made and entered a decree which was duly given and made, discharging this defendant from all of his debts and liabilities; and which discharge included the debt and liability sued on in this action;]

[Or, that on the — day of ——, the ——— court of [state the name of the court] made and entered its judgment, which was duly given and made, which discharged this defendant, who was an insolvent debtor, from his debts and liabilities, including the debt and liability on which this action is brought, and granted to defendant a certificate of such discharge [or such discharge] of which certificate [or discharge] the following is a copy: [Insert copy.]

[Or, that the alleged instrument in writing sued on in this action was given to plaintiff who is mentioned in said instrument in writing solely to secure the performance by defendant of the covenants and conditions on his part, of an agreement in writing then made between them, of which agreement the following is a copy: [Insert copy.]

That the defendant duly performed all the conditions of said last named agreement on his part, but that the plaintiff, who is a party to said agreement, did not on his part perform the conditions thereof, in that, said plaintiff [state wherein said obligee did not perform such conditions;]

WHEREFORE defendant demands judgment that the plaintiff take nothing by this action; and that defendant recover his costs of suit.

I J,
Attorney for Defendant.

A defendant can insert in like manner such other matters as a defense which would show that the defendant was released or discharged from the obligation sued on. The answer should also contain all proper denials.

FORM NO. 151.

DEFENSE OF THE INVALIDITY OF THE OBLIGATION SUED ON.

[*Name of Court.*]

The defendant as a [further] defense in this action, alleges that the supposed lease mentioned in the complaint, was and is for a longer period than one year, and the same was never in any writing, subscribed by defendant or by his agent; and there never was any note or memorandum thereof in writing subscribed by defendant or by his agent;

[Or, that the supposed agreement for the sale of land mentioned in the complaint was never in any writing subscribed by defendant, or by his agent, and there was never any note or memorandum thereof in writing subscribed by the defendant or by his agent;]

[Or, that the supposed agreement mentioned in the complaint in this action, was by its terms not to be performed within one year from the making thereof; and said supposed agreement was never in any writing subscribed by defendant or by his agent, and there never was any note or memorandum thereof subscribed by defendant or by his agent;]

[Or, that the supposed agreement mentioned in the complaint was one authorizing [or employing an agent, or broker] to purchase [or sell] real estate for a compensation [or a commis-

sion] and said supposed agreement was never in any writing subscribed by defendant or by his agent, and there never was any note or memorandum thereof subscribed by defendant or by his agent;]

[Or, defendant denies that the goods and chattels in the complaint mentioned, or any of them, were sold or delivered to this defendant, and he alleges that they were sold and delivered to one E F, and that the supposed promise of this defendant alleged in the complaint was not an original promise of the defendant, but it was a special promise to answer for the debt, default and miscarriage of said E F, and that said promise was not in writing, subscribed by this defendant, or by his agent, and there never was any note or memorandum thereof in writing subscribed by defendant or by his agent, and there never was any consideration therefor;]

[Or, that said supposed agreement alleged in the complaint in this action, was made solely on consideration of the marriage of E F to K L, and said alleged agreement and promise was never in writing subscribed by defendant or by his agent, and there never was any note or memorandum thereof in writing subscribed by defendant or by his agent;]

[Or, that said alleged agreement set out in the complaint in this action was for the sale of goods [or chattels, or things in action] for a price exceeding —— dollars; and said alleged agreement was never in any writing subscribed by defendant or his agent, and there was never any note or memorandum thereof in writing subscribed by this defendant or by his agent; and the said ———, [the buyer] never accepted or received any part of said goods [or chattels, or any of the evidence of things in action mentioned in said complaint] and he never paid any part of the purchase money;]

[Or, that one C D died intestate in ———, county in this state, and thereafter the ——— court [give title of court] on the — day of ——, made an order and decree, which were duly given and made, appointing this defendant the administrator of the estate of said C D, deceased, and granting to this defendant letters of administration on the estate of said C D, deceased, and this defendant qualified as such administrator; and thereupon, on the — day of ——, such letters of administration were issued

to defendant, and he has been ever since such administrator; and the promise sued on in this action was made by defendant while he was the administrator of said estate; and said promise was a special promise to answer damages, caused by said intestate [or to pay a debt of said intestate] out of the estate of this defendant; and said agreement was not, nor was any note or memorandum thereof, ever in writing signed by this defendant, or by any person by this defendant thereunto specially authorized;]

[Demand for judgment as in form 150.]

I J,
Attorney for Defendant.

Other defenses, if any exist, should be shown in the answer of the defendant, and the answer should also contain all proper denials.

FORM NO. 152.

DEFENSES IN AN ACTION FOR AN ALLEGED WRONG OF THE JUSTIFICATION OF THE ACTS COMPLAINED OF.

[*Name of Court.*]

The defendant answering the complaint in this action denies that defendant on the occasion mentioned in the complaint, or ever assaulted or beat plaintiff, or injured plaintiff at all other than in the necessary defense of defendant from an assault and battery, first made on the defendant by plaintiff, and defendant alleges that he used no force and did no act other than that which was necessary for such defense, and that if plaintiff sustained any injury from said acts of this defendant, or from any of them, it was occasioned solely by reason of said first assault of plaintiff on the defendant; and the said acts of the defendant are the same of which the plaintiff complains;

[Or, defendant alleges that on the occasion mentioned in the complaint, the plaintiff first assaulted the defendant [or his wife, or child] and the defendant thereupon necessarily committed the acts complained of in his necessary self defense [or in the necessary defense of his said wife, or child] and he alleges that he used no force other than that which was necessary for such defense;]

[Or, defendant alleges that on the occasion mentioned in the complaint defendant was possessed of a dwelling-house; [describe the dwelling-house] and while defendant was so possessed of said dwelling-house, plaintiff was in said dwelling-house and was making a great noise and disturbance therein against the will of the defendant; and defendant thereupon requested plaintiff to cease from doing so, and to leave defendant's said dwelling-house, but the plaintiff refused so to do; and thereupon defendant gently laid his hands upon plaintiff to remove him from defendant's said dwelling-house, and in so doing used no more force than was necessary for that purpose; and the acts of the defendant above mentioned are the same of which the plaintiff complains in his complaint in this action;]

[Or, that on the occasion of the supposed grievances alleged in the complaint the defendant was, and had been for more than —— months next before that occasion, the owner and in possession of certain real estate situate in the county of ———, in this state, described as follows, namely: [describe the real estate] and while the defendant was so the owner and in possession of said real estate, plaintiff on the occasion mentioned in the complaint, and without any right to do so, went on a portion of said real estate described as follows, [describe said real estate] and attempted to take possession of said portion of said real estate and to oust defendant therefrom [or committed trespass thereon, or attempted to commit trespass thereon] [state what such trespass or attempted trespass was] and thereupon defendant requested plaintiff to leave said premises, but plaintiff refused to do so, and thereupon defendant laid hands upon the plaintiff to force [and did force] him to leave said premises; and defendant used no more force than was necessary to accomplish such purpose; and said acts of the defendant are the same of which plaintiff complains in his complaint in this action;]

[Or, that the crime of ———, [state the crime] a felony, had been committed in the county of ———, in this state, on or about the — day of ——, and defendant was informed by [or knew] that [state the facts which would be reasonable cause for believing that plaintiff had committed the felony] and defendant believing therefrom that plaintiff had committed said felony, arrested said plaintiff and informed him of the cause of the arrest,

and took him immediately before ——— Esq., a justice of the peace of said county of ———, who was the most accessible magistrate, and caused an information charging plaintiff with the commission of said crime, with very little, and without any unnecessary delay, to be laid before said magistrate; and said acts of defendant are the supposed grievances complained of in this action;]

[Or, that at, and immediately before the times mentioned in the complaint the defendant was a constable of ———, in the county of ———, in this state; [or other peace officer, stating what] and he then was informed by ——— that a felony had been committed, namely: [state the felony and the grounds of suspicion of plaintiff] and thereupon believing such information to be true, and acting thereon, he, as such officer, arrested the plaintiff and took him immediately before ——— Esq., a justice of the peace of ———, in the county of ———, in this state, who was the most accessible magistrate; and defendant caused with little and with no unnecessary delay, an information charging plaintiff with having committed said crime, to be laid before said magistrate; and the above mentioned acts of this defendant are the same acts of which the plaintiff complains in this action;]

[Or, that before, and at the time of the committing of the supposed grievances alleged in the complaint, this defendant was a constable of the township of ———, in the county of ———, in this state, and one ——— was a justice of the peace of the same township; and said justice of the peace on the — day of —— issued a warrant for the arrest of plaintiff for the crime of larceny, directed to any constable in said county, and such warrant was delivered to this defendant as such constable to be executed; and as commanded by said warrant, defendant, as such constable, arrested plaintiff and took him forthwith before said justice of the peace, there to answer said charge of larceny; and said acts of this defendant are the same acts of which the plaintiff complains as a grievance in his complaint;]

Defendant denies that plaintiff has sustained damage in the sum of —— dollars, and denies that plaintiff has sustained any damage whatever.

WHEREFORE defendant demands judgment that plaintiff take

nothing by this action, and that defendant recover his costs of suit.

I J,
Attorney for Defendant.

The answer should also contain other proper denials of facts alleged in the complaint which are untrue.

FORM NO. 153.

DEFENSES IN ACTIONS TO RECOVER THE POSSESSION OF PERSONAL PROPERTY.

[*Name of Court.*]

[Insert proper denials and then answer as follows, namely:]

The defendant further answering the complaint in this action, and for a defense thereto, alleges that at the several times mentioned in the complaint, defendant was and he is the owner of an undivided one-half of the goods and chattels mentioned and described in the complaint, and was in the possession of the whole thereof; and the plaintiff was not at said times, or at any of them, and is not, the owner of said goods and chattels, or of any part thereof, or of any interest therein, and was not and is not entitled to the possession thereof;

That said goods and chattels were not at the commencement of this action, and have not been since, of the value of —— dollars, or of any greater value than —— dollars;

That in proceedings under the provisional remedy of claim and delivery in this action, said goods and chattels were taken by the sheriff of said county of ——— from the possession of the defendant in this action, and were delivered to the plaintiff, who has ever since unlawfully withheld from the defendant the possession of the same, to defendant's damage, —— dollars; and defendant denies that plaintiff has sustained —— dollars' damage, or any damage whatever.

WHEREFORE defendant demands judgment that plaintiff take nothing by this action, and that defendant have judgment against plaintiff for the recovery of the possession of said goods and chattels, or for the sum of —— dollars, the value thereof, in case a delivery of such possession cannot be had; for the sum of

—— dollars, defendant's damages for the detention thereof; and for defendant's costs of this action.

I J,
Attorney for Defendant.

If the defendant was the owner and was entitled to the possession of the whole of the property sued for, the answer should in connection with proper denials, state such facts.

If in an action which contains an allegation, and the defendant has no information or belief on the subject sufficient to enable him to answer the allegation, and the complaint be verified, he may answer such allegation as follows:

The defendant alleges and states that he has no information or belief upon the subject sufficient to enable him to answer the allegation in the complaint that (state the allegation); and placing his denial upon that ground, he denies said allegation and each and every part thereof.

If plaintiff alleges damage in his complaint, such allegation should be denied if the plaintiff is not, under the facts, entitled to damages.

FORM NO. 154.

DEFENSE IN THE ACTION WHEN THE DEFENDANT HAS A LIEN ON THE GOODS FOR STORAGE OR FREIGHT.

[*Name of Court.*]

The defendant answering the complaint in this action, alleges, that on the — day of ——, and before this action, the plaintiff deposited the goods and chattels mentioned in the complaint with the defendant, and defendant received the same from plaintiff for storage; [or, that the defendant is a common carrier for hire, and plaintiff delivered the goods and chattels mentioned in the complaint to defendant, and defendant received the same from plaintiff to be carried by defendant from ——— to ———] and plaintiff agreed to pay to the defendant for such storage [or such transportation] a fair and reasonable price, which is —— dollars, [or agreed to pay to the defendant for such storage [or transportation] —— dollars] on the redelivery of said goods and chattels to plaintiff; and that defendant has duly performed all the conditions of said contract on his part, and was and still is able, ready and willing, and has offered to redeliver said goods and chattels to plaintiff on his payment to defendant of said sum of —— dollars for such storage [or transportation]; but the plaintiff has not paid nor offered to pay, nor tendered said money, nor any part thereof, to defendant, and

the same is wholly unpaid, and therefore defendant detained and still detains said goods and chattels, because of the failure of plaintiff to pay said sum for such storage [or such transportation] thereof, and defendant denies that plaintiff has sustained damage in the sum of —— dollars, or any damage whatever.

WHEREFORE defendant demands judgment that plaintiff take nothing by this action, and that defendant have and recover from plaintiff the defendant's costs in this action.

I J,
Attorney for Defendant.

FORM NO. 155.

DEFENSE OF A LIEN OF DEFENDANT FOR THE MANUFACTURE OF GOODS SUED FOR.

[*Name of Court.*]

Defendant answering the complaint in this action alleges that defendant is a mechanic and manufacturer, and that as such he made and manufactured said goods and chattels mentioned in the complaint for the plaintiff under a contract with the plaintiff, and that plaintiff would, when the same were completed for the plaintiff, ready for delivery, pay defendant therefor the sum of —— dollars; and said sum is a reasonable sum for the work, skill and materials furnished by the defendant in and about the manufacturing of the same; that the defendant has duly performed all the conditions of said contract on his part, but the plaintiff never paid or tendered to the defendant said sum of —— dollars, nor any part thereof, and the same is due and wholly unpaid, and the defendant had and has a lien on said goods and chattels as security for the payment to defendant of said sum of —— dollars for said making and manufacturing of the same; and the defendant detained and detains said goods and chattels from the plaintiff by reason of defendant's aforesaid lien thereon, and defendant denies that plaintiff has sustained damage in the sum of —— dollars, or any damage whatever.

WHEREFORE defendant demands judgment that plaintiff take

nothing by this action, and that defendant recover from plaintiff defendant's costs of suit.

I J,
Attorney for Defendant.

If the goods and chattels referred to were taken from the possession of defendant by proceedings under the provisional remedy of claim and delivery, such facts should be alleged, and the demand for judgment should be as in form 153.

FORM NO. 156.

DEFENSE IN AN ACTION BY A SHERIFF FOR DETAINING GOODS AND CHATTELS WHICH ARE HELD BY HIM UNDER A WRIT OF ATTACHMENT.

[*Name of Court.*]

The defendant, answering the complaint in this action, admits that the goods and chattels mentioned in the complaint when taken by defendant, as hereinafter shown, were the property of the plaintiff; but denies that said goods and chattels were, when so taken, or have been since, of the value of —— dollars, or of any greater value than —— dollars;

And as a defense in this action, the defendant alleges that on the — day of —— defendant was and ever since has been the sheriff of the county of ———, in this state; (1) and that on the — day of —— one A B commenced an action in the Superior Court of the state of California, in the county of ———, against C D, the plaintiff in this action on a contract made [or payable] in this state, for the direct payment of money; and for the purpose of procuring a writ of attachment to be issued in that action against the property of said C D, the defendant in that action, and who is the plaintiff in this action; said A B, the plaintiff in that action, made and filed in that action in the office of the clerk of said court on the — day of —— an affidavit in which he stated that the defendant in that action was indebted to the plaintiff therein in the sum of —— dollars over and above all legal set offs and counter claims, upon a contract express [or implied] for the direct payment of money, and that such contract was made [or is payable] in this state, and that the payment of the same had not been secured by any mortgage or lien upon

real or personal property, or by any pledge of personal property, and that the attachment was not sought, and the action was not prosecuted to hinder, delay or defraud any creditor of the defendant in that action; and thereupon said clerk of said court required of the plaintiff in that action a written undertaking on the part of the plaintiff in that action in the sum of —— dollars, with sufficient sureties to the effect that if the defendant in that action recovered judgment, the plaintiff in that action would pay all costs that might be awarded to the defendant in the action, and all damages he might sustain in the action, not exceeding the sum of —— dollars; and that such undertaking was given as so required, and thereupon a writ of attachment was issued in said action out of said court directed to the sheriff of said county of ———, commanding and requiring him to attach and safely keep all the property of the defendant in that action within his county, not exempt from execution, or so much thereof as might be necessary to satisfy the demand of the plaintiff in that action, the amount of which was stated in the writ in conformity with the complaint in that action, unless the defendant in that action gave him security by the undertaking of at least two sufficient sureties in an amount sufficient to satisfy such demand, besides costs, in which case to take such undertaking; and the writ of attachment so issued was delivered to this defendant as sheriff, as aforesaid, and the defendant in that action did not give any undertaking to prevent his property from being attached under said writ; and therefore, defendant as sheriff, as aforesaid, and as commanded by said writ of attachment, attached and safely kept, and is safely keeping, the goods and chattels mentioned in the complaint in this action, and sued for therein; and said goods and chattels are not, nor is any part thereof exempt from execution, and said writ of attachment is still in full force; (2) defendant denies that plaintiff has sustained damage in the sum of —— dollars, and denies that plaintiff has sustained any damage whatever.

[If the property had been taken from the sheriff under proceedings in the provisional remedy of claim and delivery, such fact should be alleged.]

WHEREFORE defendant demands judgment; [state the demand as in form 154, if the property has not been taken from

the sheriff; or as in form 153 in case the property has been taken from the sheriff by proceedings under the provisional remedy of claim and delivery in the action.]

I J,
Attorney for Defendant.

FORM NO. 157.

ANSWER BY A SHERIFF WHO HAS ATTACHED PROPERTY WHEN PLAINTIFF CLAIMS TO BE THE OWNER BY A CONVEYANCE THEREOF WHICH IS FRAUDULENT AGAINST CREDITORS OF THE VENDOR.

[*Name of Court.*]

The defendant answering the plaintiff's complaint in the action, denies upon his information and belief that the plaintiff was at the times mentioned in the complaint in this action, or at any of said times, or was ever, the owner of the goods and chattels mentioned in the complaint, or of any of them, except by a sale thereof made to him by one C D, who was the owner thereof at the time of such sale, and which sale was fraudulent, as hereinafter shown;

Defendant alleges that he was on the — day of ——, and ever since has been the sheriff of the county of ———, in this state; [then state the action in which a writ of attachment was issued, the affidavit and undertaking for the issuance of the writ, the issuance of the writ, and the commands of the writ, and its delivery to the defendant, as sheriff, as between 1 and 2, in form 156, and then continue as follows:]

Defendant alleges on his information and belief, that the only right to, or ownership of, the goods and chattels mentioned in the complaint and sued for in this action, which plaintiff had at the time of the levy hereinafter mentioned under said writ on said goods and chattels, or ever had, was by a pretended sale thereof, made to him by said C D, who is the defendant in said attachment suit; and such sale was made by said C D, and was received by plaintiff, to hinder, delay and defraud the creditors of said C D, and to hinder, delay and defraud the plaintiff in said attachment suit, who then was and he is, a creditor of said C D;

That at the time of said sale to the plaintiff in this action, said C D was indebted to the plaintiff in said attachment suit on the claim and demand on which said suit was brought, and said C D had the possession and control of the goods and chattels so sold by him to the plaintiff in this action; and such sale was not accompanied by an immediate delivery of the property so sold, nor was it followed by an actual and continued change of the possession thereof; [or state other facts showing fraud in such sale.]

That upon the delivery of said writ of attachment to this defendant as aforesaid, this defendant attached said goods and chattels, as required by such writ of attachment, as the property of the defendant in said attachment suit, C D, and safely kept the same thereunder;

That said writ of attachment has not been discharged, and it remains in full force; defendant denies that the goods and chattels mentioned in the complaint were at any time of the value of —— dollars, and denies that the same were ever of any greater value than —— dollars; and defendant denies that plaintiff has sustained damage in the sum of —— dollars, and denies that plaintiff has sustained any damage whatever.

[If the property was taken from the possession of the defendant by proceedings under the provisional remedy of claim and delivery, state such fact, and demand judgment as in form 153; otherwise as in form 154.]

I J,
Attorney for Defendant.

FORM NO. 158.

ANSWER OF A SHERIFF IN AN ACTION IN WHICH THE SHERIFF JUSTIFIES UNDER A WRIT OF EXECUTION TO ENFORCE A JUDGMENT.

[*Name of Court.*]

The defendant answering the complaint in this action, denies upon his information and belief that plaintiff was at the times mentioned in the complaint, or at any of said times, or was ever, the owner of the goods and chattels mentioned in the complaint,

or of any of them, or of any part thereof, except under a sale of the same made to him by one C D, who was the owner thereof at the time of said sale, and which sale was fraudulent against the creditors of said C D, as hereinafter shown;

The defendant alleges, that he was on the — day of ——, and ever since has been the sheriff of the county of ———, in this state, and that in an action in the Superior Court of the state of California, in the county of ———, in which one A B was plaintiff, and the said C D was defendant, said A B, the plaintiff in that action, on the — day of ——, recovered judgment, which was duly given and made, against the said C D, the defendant in that action, for —— dollars; which judgment was entered and docketed the same day, and is wholly unpaid and unsatisfied; and thereafter, on the — day of ——, a writ of execution was issued out of said court in that action, directed to the sheriff of said county of ———, requiring such sheriff to satisfy said judgment with interest out of the personal property of said C D, said judgment debtor, not exempt from execution; and if sufficient personal property could not be found, then out of his real property; and thereafter, and on the same day, said writ of execution was delivered to this defendant, as the sheriff of said county of ———. Said writ intelligibly referred to said judgment, and stated the court in which it was rendered, the county in which the judgment roll was filed, the amount of the judgment, and the amount actually due thereon; [and the kind of money in which the judgment was payable.]

And this defendant, as such sheriff, on the — day of ——, in said county of ———, under and by virtue of said writ of execution, and as thereby commanded, levied on the goods and chattels mentioned and described in said complaint, and which at the time of said levy were in the possession of and under the control of said C D, the said execution debtor; and gave notice of the sale thereof under said execution, on the — day of ——, to commence at — o'clock — m. for the purpose of satisfying said judgment, and said property so levied on was not, nor was any of it, exempt from execution;

That the plaintiff in this action claims to be the owner of said goods and chattels; but defendant alleges upon his information and belief that plaintiff's only title thereto, and ownership

thereof, was and is by a pretended sale thereof made on the — day of —— by said C D to the said plaintiff;

And defendant alleges upon his information and belief that said C D was in possession and had control of the property so sold at the time of such sale; and such sale was not accompanied by an immediate delivery of the property so sold, nor was it followed by an actual and continued change of the possession thereof, or of any of it; and said sale was made by said C D, and was received by the plaintiff, to hinder, delay and defraud the creditors of said C D, and the plaintiff in the action in which said judgment was rendered, who was at the time of said pretended sale, a creditor of said C D, on the claim and demand sued on in said action against him;

That said C D has no property in said county of ——— other than said goods and chattels mentioned in the complaint, out of which said judgment can be satisfied; [or state any other facts which show that such sale was fraudulent] defendant denies that the goods and chattels mentioned in the complaint were ever of the value of —— dollars, and denies that they were ever of any greater value than —— dollars; and defendant denies that plaintiff has sustained damage in the sum of —— dollars; and denies that plaintiff has sustained any damage whatever.

WHEREFORE defendant prays judgment that plaintiff take nothing by this action, and that defendant have and recover his costs of suit.

I J,
Attorney for Defendant.

If the property sued for had been taken from the possession of the sheriff under the provisional remedy of claim and delivery, such fact should be alleged in the pleadings, and the demand for judgment should be as in form No. 153.

FORM NO. 159.

ANSWER TO VERIFIED COMPLAINT IN EJECTMENT.

[*Name of Court.*]

The defendant, answering the complaint in this action, denies that plaintiff was at the commencement of this action, or has been since, the owner of the real property described in the

complaint, and sued for in this action, or of any part thereof, or of any estate or interest therein; [deny other material allegations of the complaint which the defendant knows, or believes upon his information to be untrue] defendant denies that plaintiff has sustained —— dollars damage, or any damage whatever.

WHEREFORE defendant demands judgment that plaintiff take nothing by this action, and that defendant have judgment for his costs of suit.

I J,
Attorney for Defendant.

[*Duly Verified.*]

FORM NO. 160.

ANSWER IN ACTIONS FOR A SPECIFIC PERFORMANCE.

[*Name of Court.*]

The defendant answering the complaint in this action, and as a defense thereto, alleges that the plaintiff did not pay [or tender] [or offer in writing to pay] to the defendant the sum of —— dollars, alleged in the complaint to have been by plaintiff paid, [or tendered] [or offered in writing to be paid] or any part thereof, a part of the purchase money agreed to be paid by plaintiff for the [describe the property mentioned in the complaint in the action] and plaintiff has never been able, ready or willing to pay the same. [Deny as in form 156, damage if any be alleged.]

WHEREFORE defendant demands judgment that plaintiff take nothing by this action, and that defendant have and recover his costs of suit.

I J,
Attorney for Defendant.

In an action for the specific performance of a contract, the defendant should, in his answer to the complaint, deny such material facts alleged in the complaint which the defendant knows, or believes on his information to be untrue; and should allege other facts which are true, and which would show that the plaintiff ought not to recover a judgment in the action, or ought not to recover such a judgment therein as is demanded.

A defendant in an action may, in addition to the part of the answer which controverts allegations of fact contained in the complaint, and to his other defenses therein, allege in his answer as a counter claim:

First. A cause of action arising out of the transactions set forth in the

complaint as the foundation of the plaintiff's claim, or connected with the subject of the action. In California, if he fail to set forth such counter claim in his answer, neither he nor his assignee, can afterwards maintain an action against the plaintiff therefor.

Second. In an action arising upon a contract, he may allege any other cause of action also arising upon contract, and existing at the commencement of the action, which he has against plaintiff.

If there be a counter claim set out in the answer, the defendant should demand judgment thereon.

FORM NO. 161.

ANSWER SETTING FORTH A COUNTER CLAIM ARISING OUT OF THE TRANSACTION OUT OF WHICH THE ACTION IS BROUGHT.

[*Name of Court.*]

[After denials and the allegations of facts which constitute defenses in the action, if any, continue:]

Answering [or further answering] in the action, and by way of counter claim, defendant alleges:

That the promissory note sued on in this action was given by the defendant for a band of cattle purchased by the defendant from the plaintiff on or about the — day of ——; and the plaintiff on said purchase by the defendant warranted that said cattle were sound and free from disease; but the said cattle were not then sound nor free from disease, but some of them were diseased with the Texas fever, which is contagious; that the defendant had no knowledge or notice at the time of said purchase that any of the cattle of said band of cattle so purchased were diseased with said disease, or with any disease;

That the defendant at the time of said purchase was the owner of a band of cattle of about —— head, with which he intended to have the cattle so purchased to run, and of this plaintiff had knowledge at the time of such purchase;

That before defendant had any knowledge that any of the cattle he purchased from plaintiff were so diseased, he permitted the cattle he purchased to run with the band of cattle he owned when such purchase was made; by reason of which many of such cattle which he owned at the time of said purchase became diseased with said Texas fever, to defendant's damage, ——— dollars;

That said cattle, so purchased, were at the time of said purchase, by reason of said disease, of much less value than they would have been if not so diseased, and defendant sustained damage thereby in the further sum of ——— dollars.

WHEREFORE defendant demands judgment that plaintiff take nothing by this action; and that defendant recover from plaintiff ——— dollars; and defendant's costs of suit.

I J,
Attorney for Defendant.

FORM NO. 162.

COUNTER CLAIM IN AN ACTION FOUNDED ON A CONTRACT.

[*Name of Court.*]

[State other defenses, if any, to the action, and then continue:]

Defendant answering [or further answering] the complaint in this action, and by way of counter claim alleges:

I.

That plaintiff on the — day of —— made and delivered for value to one E F, plaintiff's promissory note, of which the following is a copy: [Insert]

II.

That on the — day of —— and before this action, said E F for value sold, endorsed, transferred and delivered said promissory note to defendant, and defendant has never sold, endorsed, transferred or delivered the same to any person, and defendant is the owner and holder thereof;

III.

That said promissory note was due before and at the commencement of this action, and is wholly unpaid.

WHEREFORE defendant demands judgment for ——— dollars; and defendant's costs of suit.

I J,
Attorney for Defendant.

The statement of facts in a counter claim should be similar to what such statement should be, if an original action were brought thereon by defendant against the plaintiff.

In California, and in some of the other code states, whenever the defendant seeks affirmative relief against any party relating to, or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates, he may in addition to his answer, file at the same time, or by permission of the court, subsequently, a cross-complaint, which must be served upon the parties affected thereby; and such parties may demur or answer thereto, as to an original complaint.

In New York there is no code provision for such cross-complaint, and appropriate relief can be obtained under a proper demand for such relief, on the statement of facts in the answer, by way of a counter claim, which would entitle the defendant to such relief.

FORM NO. 163.

CROSS-COMPLAINT IN AN ACTION OF EJECTMENT.

[*Name of Court.*]

The defendant as a cross-complaint in this action alleges that on the — day of ——, A B, the plaintiff in this action, was the owner of the premises which are described in the complaint in this action, and are sued for therein; and said plaintiff has a title thereto; and which premises are described as follows, namely: [Describe the real estate] and on that day the defendant made a written contract with said plaintiff in this action, and in and by said contract the plaintiff sold to the defendant said premises, and defendant purchased them from said plaintiff for the sum of ——— dollars, which said plaintiff agreed to receive, and the defendant agreed to pay plaintiff therefor, to be paid as follows, namely:

——— dollars thereof at the time of the making of said contract, and [state the times of other payments under said contract]; and plaintiff agreed that the defendant should have under said contract of sale and purchase the immediate possession of said premises; and that on the full payment of said purchase money plaintiff agreed to make to the defendant a deed, conveying to him said premises in fee;

II.

That on the making of said contract of sale, the defendant paid to plaintiff under said contract said sum of ——— dollars, the first agreed installment of payment for said land, and plaintiff put the defendant in the possession of said premises as such purchaser thereof; and defendant has ever since been in possession thereof under said contract of purchase, and has

built a permanent and valuable barn thereon, and made other valuable and permanent improvements thereon, after he received possession of said real property as such purchaser thereof;

III.

That the defendant has duly performed all the conditions of said contract on his part; and before this action defendant tendered to the plaintiff the sum of ——— dollars, which was the full amount of the unpaid balance of the purchase price for said premises and demanded a deed from plaintiff conveying said premises to defendant; but plaintiff refused, and ever since has refused, to receive the said money so tendered, and to make to defendant such or any deed for said premises;

IV.

That this defendant has ever since such tender to plaintiff been able and willing to pay to the plaintiff said sum of money so tendered; and defendant has paid the same into this court in this action, ready to be paid to plaintiff if he will accept the same and make to defendant such deed for said premises;

V.

That defendant is able, ready and willing, and offers to pay to plaintiff such other or further sum of money as the court may adjudge to be just, under all the circumstances of the case.

WHEREFORE defendant demands judgment against plaintiff, that plaintiff receive said sum of money so tendered to the plaintiff; and such further sum of money, if any, which this court may adjudge to be just; and that plaintiff make to defendant a deed conveying to defendant said premises in fee; and for such other or further relief as the equity of the case may warrant; and for defendant's costs of suit.

I J,
Defendant's Attorney.

PROCEEDINGS ON THE PART OF PLAINTIFF AFTER ANSWER OR CROSS COMPLAINT, AND BEFORE PREPARATIONS FOR TRIAL.

Within ten days after the plaintiff has received an answer which contains a defense founded on a written instrument, a copy of which is contained in the answer, or is annexed thereto, he must make and file with the clerk, an affidavit denying the genuineness and due execution of said written instrument, and serve on the defendant's attorney a copy of said affidavit, or he will be deemed to admit such genuineness and due execution, unless he be refused an inspection of the original on a demand in writing therefor; such demand may be made and filed as indicated by form No. 144.

Should the plaintiff wish to move to strike out the answer, or any portion thereof, as sham, irrelevant, or immaterial, he can do so on giving notice of such motion in the manner as indicated in form No. 137.

The plaintiff may demur to the answer, or to one or more of the several defenses or counter claims set up in the answer within the same time after service of the answer, as the defendant is allowed to demur after service of the summons, on one or more of the grounds following, namely:

First. That several causes of counter claim have been improperly joined;

Second. That the answer does not state facts sufficient to constitute a defense or counter claim;

Third. That the answer is ambiguous, unintelligible or uncertain.

Form No. 147, and what is stated in connection with the same, will indicate how such demurrer should be made.

In California, and in some of the other code states, the statement of new matter in the answer, in avoidance or constituting a defense or counter claim, is deemed controverted by the plaintiff; but in New York, and some other code states, such new matter must be controverted by a replication thereto filed by the plaintiff.

When a cross-complaint is filed, the allegations therein, after a demurrer (if any) thereto, has been overruled, must be controverted by the opposite parties by an answer thereto, or the material allegations of such cross-complaint will be taken to be true as against an opposite party who does not so controvert the same.

A defendant who files a cross-complaint is, as to such cross-complaint, the plaintiff, and the opposite parties to the cross-complaint are the defendants, and the cross-complaint is to be treated as an original complaint, and motions to strike out the same, or any portion thereof, or any portion of an answer thereto, and a demurrer thereto, or to any portion thereof, and a demurrer to an answer thereto, must be the same as they would be in case the cross-complaint was an original complaint in an action.

When it appears to the court by affidavit or otherwise that a complete determination of a controversy in an action cannot be had without the presence of other parties, the court must order them to be brought in, and to that end may order amended and supplemental pleadings, or a cross-complaint to be filed, and a summons on such cross-complaint to be issued and served on persons who are not parties to the original action.

The court may also, in an action for the recovery of real or personal property, on the application of a person who is not a party to the action, but has an interest in the subject of the action, order such person to be brought in by a proper amendment. Code of Civil Procedure, Sec. 389.

A court may, on a proper application therefor, on motion, allow the plaintiff or defendant to file a supplemental complaint or answer, alleging facts material to the case, and occurring after the former complaint or answer.

Such motion should be made on a verified petition, or on an affidavit, showing the occurrence of such material facts after such former complaint or answer was filed, and on notice to the opposite party.

FORM NO. 164.

APPLICATION FOR THE ENTRY OF THE DEFAULT OF A DEFENDANT WHO HAS BEEN PERSONALLY SERVED WITH THE SUMMONS IN AN ACTION FOR MONEY OR DAMAGES, AND HAS NOT APPEARED OR DEMURRED OR ANSWERED, AND FOR ENTRY OF JUDGMENT AGAINST HIM.

[*Name of Court.*]

C D, the [or a] defendant in this action, having been personally served with the summons in the action, and having failed to appear and answer or demur within the time specified in the summons [and having failed to appear and answer or demur within the further time granted], A B, the plaintiff in the action, applies to the clerk of said court to enter the default of the defendant, C D, for such failure to appear and answer or demur, and to enter judgment in favor of plaintiff and against the defendant C D, for the amount specified in the summons; and plaintiff's costs in the action.

[*Date.*]

G H,
Attorney for Plaintiff.

To ———, Esq.,
Clerk of said Court.

If further time has not been given to answer, the words (and having failed to appear and answer within the further time granted) should be omitted.

FORM NO. 165.

ENTRY OF DEFAULT BY CLERK, ON SUCH APPLICATION.

[*Name of Court.*]

A summons having been issued in this action, and such summons having been returned and filed in the action, with written evidence thereon that C D, the [or a] defendant in the action had been served personally with said summons, and said defendant C D having failed to appear and file an answer or demurrer to the complaint in the action within the time specified in such summons [and having failed to file an answer or demurrer to the complaint in the action within the further time granted], and A B, the plaintiff in the action, having made

application to ———, the clerk of said court, to enter the default of C D, the [or a] defendant in the action, for such failure to appear and answer or demur to the complaint in the action, and to enter judgment in favor of the plaintiff and against the defendant C D, for the amount specified in the summons, and plaintiff's costs in the action, the default of the defendant for failure to appear and answer in the action is entered.
[*Date.*]

———,
Clerk.
By ———,
Deputy Clerk.

FORM NO. 166.

MEMORANDUM ENDORSED ON THE COMPLAINT IN AN ACTION, OF THE DEFAULT OF DEFENDANT.

The default of the defendant C D in not answering the within complaint is entered.
[*Date.*]

———,
Clerk.
By ———,
Deputy Clerk.

FORM NO. 167.

JUDGMENT ENTERED ON DEFAULT FOR NOT ANSWERING.

[*Name of Court.*]

The defendant C D, having been personally served with the summons issued in this action, and having failed to file an answer or a demurrer to the complaint in the action within the time prescribed by law, [and within the time granted] and his default for so failing having on the application of the plaintiff in the action been entered, and G H, the attorney for the plaintiff in the action having applied for entry of judgment in the action in favor of the plaintiff and against C D, the [or a] defendant in the action for the amount specified in the summons in the

action including costs, judgment is therefore entered in the action that A B, the plaintiff in the action, have and recover from C D, the defendant in the action, ——— dollars, and ——— dollars, costs of suit.

Judgment entered the — day of ———.

FORM NO. 168.

AFFIDAVIT OF ATTORNEY FOR PLAINTIFF OF NOTICE TO DEFENDANT OF AN ORDER OVER-RULING DEMURRER, AND GRANTING TIME TO ANSWER.

[*Name of Court.*]

[*Venue.*]

G H, being duly sworn, says: That he is the attorney of A B, the plaintiff in this action, and that on the — day of ——, he served on I J, the attorney for C D, the [or a] defendant in the action, a written notice that the court on the — day of —— overruled the said defendant's demurrer to the complaint in this action, and granted to said defendant —— days to answer the complaint in the action.

[*Jurat.*] G H.

FORM NO. 169.

APPLICATION TO ENTER DEFAULT OF DEFENDANT FOR FAILURE TO ANSWER AFTER OVER-RULING HIS DEMURRER, AND GRANTING HIM TIME TO ANSWER.

[*Name of Court.*]

C D, the [or a] defendant in this action, having appeared and demurred to the complaint therein, and said demurrer having been on the — day of —— overruled by the court, and the court having on said day granted to said defendant C D —— days time to answer the complaint in the action, and notice having been served on I J, the attorney of said defendant C D, on the — day of —— of such order, and of said time granted, and said defendant having failed for more than —— days after the service of said notice to file an answer in the action, A B, the plaintiff in the action, applies to the clerk of the court to

enter the default of the defendant C D for his failure to file an answer in the action within the time granted, and to enter judgment in favor of plaintiff and against the defendant C D for the amount specified in the summons; and plaintiff's costs in the action.

[*Date.*]

G H,
Attorney for Plaintiff.

To ————, Esq.,
Clerk of said Court.

FORM NO. 170.

ENTRY BY THE CLERK OF THE DEFAULT OF A DEFENDANT, FOR FAILURE TO ANSWER, AFTER THE OVER-RULING BY THE COURT OF HIS DEMURRER.

[*Name of Court.*]

C D, the [or a] defendant in this action, having demurred to the complaint in this action, and the court having overruled his demurrer, and having granted to him —— days to answer the complaint in the action, and I J, the attorney of said C D, having on the — day of —— received written notice of the order of the court overruling the demurrer and granting him time to answer the complaint in the action, and evidence of the service of such notice having been filed in the action, and —— days having expired since the service of said notice, and the defendant C D having failed to file any answer to the complaint in the action, and plaintiff having applied to the clerk of this court to enter the default of the defendant for such failure, therefore the default of the defendant C D is entered for failure to answer the complaint within the time granted.

[*Date.*]

————,
Clerk.

By ————,
Deputy Clerk.

A memorandum of the default should be endorsed on the complaint as in form No. 166, and judgment should be entered by the clerk similar to the judgment in form No. 167.

FORM NO. 171.

APPLICATION FOR DEFAULT OF DEFENDANT FOR FAILURE TO ANSWER AN AMENDED COMPLAINT WITHIN THE TIME DIRECTED BY THE COURT.

[*Name of Court.*]

The demurrer of the defendant to the original complaint in this action having been sustained, with leave to the plaintiff to amend his complaint, and the court having required the complaint as amended to be filed and a copy of the amended complaint to be served upon the defendant C D; [who was by the court directed to answer such amended complaint within —— days after such service] and service of such amended complaint having been made on the defendant C D on the — day of ——, and evidence of such service being on file in this action, and the defendant C D having failed to file an answer to the amended complaint within the time required by law, and by such direction the plaintiff A B applies to the clerk of the court to enter the default of the defendant C D for such failure, and to enter a judgment in favor of the plaintiff and against C D for the amount demanded in the summons in this action, and plaintiff's costs of suit.

[*Date.*]

G H,
Attorney for Plaintiff.

To ————, Esq.,
Clerk of said Court.

FORM NO. 172.

ENTRY OF DEFAULT OF DEFENDANT, ON THE APPLICATION OF PLAINTIFF FOR FAILURE TO ANSWER AN AMENDED COMPLAINT.

[*Name of Court.*]

The court having sustained the demurrer of the defendant C D to the complaint in the action, with leave to plaintiff to amend his complaint, and the court having required the amended complaint to be filed and a copy thereof to be served upon the defendant C D, who was by the court directed to answer such amended complaint within —— days after such service, and

plaintiff having filed his amended complaint in the action, and evidence of the service of a copy thereof on defendant on the —— day of ——, having been filed, and the defendant C D having failed to file any answer to said amended complaint within the time required by law and by such direction, and the plaintiff having applied to the clerk of the court to enter the default of the defendant C D for such failure, therefore the default of the defendant C D for failure to file an answer to the amended complaint within the time required by law and by the direction of the court is entered.

[*Date.*]

——————,
Clerk.

By ——————,
Deputy Clerk.

A memorandum of the entry of such default should be endorsed on the amended complaint as in form 166, and judgment should be entered similar to the judgment indicated by form No. 167.

A defendant must answer an amended complaint within ten days after its service, or within such time as the court directs such answer to be filed.

Code of Civil Procedure, Sec. 432.

FORM NO. 173.

APPLICATION FOR DEFAULT IN ACTIONS OTHER THAN ACTIONS UPON CONTRACT FOR THE RECOVERY OF MONEY, OR FOR DAMAGES ONLY, WHEN THE SUMMONS HAS BEEN PERSONALLY SERVED.

[*Name of Court.*]

The defendant C D, having been personally served with the summons in this action, and the summons, with the evidence of such service, having been filed, and the defendant having failed to appear and answer in the action within the time required by the summons; and no further time having been granted the defendant C D to appear and answer in the action, the plaintiff applies to the clerk of said court to enter the default of the said defendant C D, for failure to appear and answer.

[*Date.*]

G H,
Attorney for Plaintiff.

To ——————, Esq.,
Clerk of said Court.

FORM NO. 174.

ENTRY OF SUCH DEFAULT BY THE CLERK.

[*Name of Court.*]

A summons having been issued in this action, and such summons having been personally served on the defendant C D in this action, and said summons having been, with the evidence of such service endorsed thereon, [or attached thereto] filed in the action, and said defendant having failed to appear and answer within the time required by the summons, and no further time to appear and answer having been granted; and the attorney for plaintiff in the action having made application to the clerk of the court to enter the default of the defendant C D for failure to appear and answer in the action, the default of the defendant for failure to appear and answer in the action is hereby entered.

[*Date.*]

_____,
Clerk.

By _____,
Deputy Clerk.

The clerk of the court can exercise no judicial function, and the entry by the clerk of a default, or of a judgment by default, should recite the facts which give the clerk authority to enter a default, or enter judgment by reason of the default of a defendant; such facts must exist in order that such default or such judgment have any validity.

In case a defendant be not personally served with a summons in the action, neither the default of the defendant, nor judgment by default, can be legally entered by the clerk.

FORM NO. 175.

JUDGMENT WHEN THERE IS NO ANSWER IN A CASE IN WHICH THE SERVICE OF THE SUMMONS IS BY PUBLICATION.

[*Name of Court.*]

The plaintiff in this action having proven to the satisfaction of the court, that a summons in the action has been issued, and that such summons has been duly served by publication and as required by law and by the order of a judge of this court, and that the time for answering the complaint in this action has expired for more than thirty days after such service by

publication was made, and that no answer has been filed in the action; and the plaintiff having applied for judgment in the action, and the court having thereupon required proof to be made of the cause of action mentioned in the complaint, and such proof having been made, [and the court having examined on oath the plaintiff [or E F, his agent] respecting any payments that have been made to the plaintiff, or to any one for his use, on account of such cause of action] and the court from the proofs made, having made its findings of facts and conclusions of law therefrom, as follows, namely: [Insert findings of court] and having ordered judgment accordingly;

IT IS THEREFORE ADJUDGED AND DECREED [State the judgment as ordered in such findings].

[*Date.*] _____,

Judge.

A judgment should be entered by the clerk in the judgment book of the court, with the time of such entry.

The parties to an action should be prompt in preparing for the trial of the action and in the preparation of evidence for such trial. If after a careful consideration of the case the defendant is of opinion that the plaintiff is entitled to some judgment in the action, but one less favorable to him than the one which he claims, the defendant, to save costs in the action, should offer to allow the plaintiff to take judgment against the defendant, which offer should be quite as favorable to the plaintiff as the defendant deems the plaintiff entitled to.

FORM NO. 176.

OFFER OF DEFENDANT TO ALLOW PLAINTIFF TO TAKE JUDGMENT.

[*Name of Court.*]

The defendant in this action offers to allow judgment to be taken against him by the plaintiff for [specify the money, property, or the effect for which the offer is made] with costs.

[*Date.*] *Defendant's Signature.*

I J,

Attorney for Defendant.

To G H, Esq.,

Attorney for Plaintiff.

The defendant's signature to the offer would show that he consented to the offer.

In California, this offer can be made at any time before trial or judgment. Code of Civil Procedure, Sec. 997.

This offer should be served personally on the attorney for the plaintiff.

FORM NO. 177.

ACCEPTANCE OF THE OFFER.

[*Name of Court.*]

You are notified that the plaintiff in this action accepts the offer of the defendant in the action to allow plaintiff to take judgment in this action against the defendant for [state the judgment which is offered to be allowed.]

[*Date.*] G H,

Attorney for Plaintiff.

To I J, Esq.,

Attorney for the Defendant.

In California there may be such acceptance within five days after service of the offer.

Code of Civil Procedure, Sec. 997.

FORM NO. 178.

PROOF OF THE RECEIPT AND ACCEPTANCE OF THE OFFER.

[*Name of Court.*]

[*Venue.*]

G H, being duly sworn, deposes and says: That he is the attorney of the plaintiff in this action, and that an offer of defendant to allow judgment to be taken against him, and which offer is herewith filed, was served on this defendant on the — day of ——; and that on the — day of ——, the plaintiff accepted said offer, and deponent served on said — day of —— upon I J, Esq., the defendant's attorney, notice of such acceptance, of which notice the following is a copy: [Insert copy of notice of acceptance.]

[*Jurat.*] G H.

Upon filing said offer, and filing such affidavit showing the acceptance of such offer and notice of the acceptance thereof, the clerk will enter judgment.

FORM NO. 179.

ENTRY OF JUDGMENT BY CLERK ON SUCH OFFER AND ACCEPTANCE.

[*Name of Court.*]

This action having been commenced, and a summons having been issued therein, and said summons having been returned, with evidence showing personal service thereof on the defendant C D, on the — day of ——, in the county of ———, in the state of California; and the defendant C D having appeared in the action, and said defendant having on the — day of —— offered the plaintiff in writing to allow the plaintiff to take judgment against him for [state for what, as in offer] and the plaintiff having accepted said offer and served a notice of such acceptance on the — day of ——, and said offer and proof of notice of such acceptance and of the service of such notice having been filed, therefore judgment is entered in favor of the plaintiff A B, and against the defendant C D; that the plaintiff A B have and recover from said defendant C D ———, [state the sum, property or to the effect, specified in the offer] with ——— dollars plaintiff's costs and disbursements in the action.

Judgment entered this — day of ——.

In California, if the plaintiff does not accept the offer and give notice of such acceptance within five days after service thereof, the offer is deemed to be withdrawn, and cannot be given in evidence on the trial; and if the plaintiff fail to recover judgment more favorable than the one offered, he cannot recover costs, but must pay the defendant's costs from the time of the offer.

Should either party wish to obtain an inspection and copy of any entries in a book of account, paper or writing in the possession or control of the adverse party, and deems such copies may in the absence of the original papers be material evidence on his part, he may obtain such copies as indicated in forms Nos. 142 and 143.

Should he wish to introduce such copies in evidence in absence of the originals, he may do so on giving a reasonable notice to the opposite party to produce the originals.

FORM NO. 180.

NOTICE TO PRODUCE BOOK, OR AN INSTRUMENT IN WRITING.

[*Name of Court.*]

You are notified to produce on the trial of this action for use by plaintiff [or defendant] as evidence on such trial, a cer-

tain book of account [describe it as accurately as possible] [or a certain deed or instrument in writing, describing it as accurately as possible.]

[*Date.*] *Signature of Plaintiff's [or Defendant's] Attorney*

Address to Attorney of Opposite Party.

A copy of the notice should be made, and an admission (or an affidavit) showing the service of the original should be endorsed thereon.

On failure to produce the original as so notified, a copy of the original, or parol evidence of its contents, may be introduced in evidence by the party serving such notice. The party desiring such original as evidence, may have a subpoena duces tecum, for the production of such original in court on the trial of the action, and the witness may be required to obey the commands of such subpoena.

The deposition of a witness residing or being in this state may, in the cases and as provided by statute, be taken and returned to the court, and used as evidence on the trial of the action.

The deposition taken cannot be read as evidence, unless proof is made at the trial that the witness is absent from the county in which his testimony is to be used, or resides out of such county, and more than thirty miles from the county seat thereof, or that he is too infirm to attend at the trial, or is dead; but such proof need not be made when the witness is a party to the action or proceeding; nor when the testimony is produced on a motion, or in any other case where the oral examination of the witness is not required.

Code of Civil Procedure, Sec. 2032.

The testimony of a witness may be taken by deposition in an action at any time after the service of the summons, or the appearance of the defendant; and in a special proceeding, at any time after a question of fact has arisen therein.

Code of Civil Procedure, Sec. 2021.

Notice must be given of the time and place of taking the deposition, if taken in this state, and who the officer is before whom the deposition will be taken. Such notice must be as prescribed in section 2031 of the Code of Civil Procedure.

FORM NO. 181.

AFFIDAVIT FOR TAKING THE DEPOSITION OF A WITNESS RESIDING IN THIS STATE.

[*Title of Action or Proceeding.*]

[*Venue.*]

A B, being duly sworn, deposes and says: That he is the plaintiff [or the defendant] in the above entitled action [or proceeding] that the summons in the action has been served; [or that the defendant has appeared therein] [or in a special proceeding that a question of fact has arisen therein] that E F is a material witness for the plaintiff [or the defendant] for the trial of the action, [or proceeding] [here state the facts

showing the case to be one provided by the Code of Civil Procedure.]

[*Jurat.*] A B.

FORM NO. 182.

NOTICE FOR THE TAKING OF THE DEPOSITION OF A WITNESS.

[*Title of Action or Proceeding.*]

You will take notice that the deposition of E F, a witness for the plaintiff [or defendant] in this action [or proceeding] will be taken before ———, Esq., a notary public [or other officer authorized to take depositions, giving the name of office] at his office in the city [or town] of ———, in the county of ———, in this state, commencing at — o'clock — m., of the — day of ——; and that the taking of the same will be continued thereafter, and from day to day until such deposition is fully taken.

And you will further take notice that the annexed is a copy of the affidavit [and order] upon which such deposition will be taken.

[*Date.*] *Signature of Attorney of Plaintiff* [*or Defendant.*]

Address to the Attorney of the Adverse Party.

If the time prescribed by statute for giving notice for the taking of the deposition should, for any good cause, be shortened by a judge of the court in which the action is pending, this can be done by making and filing an affidavit showing such good cause, and procuring the order of such judge prescribing a shorter time. A copy of such order, if made, and a copy of the affidavit made for taking the deposition of a witness should be attached to and served with the notice for taking the deposition; and evidence of service of the notice and of such copies should be on or attached to a copy of the notice so served.

FORM NO. 183.

DEPOSITION OF A WITNESS TAKEN IN A STATE IN WHICH THE DEPOSITION IS TO BE USED AS EVIDENCE.

[*Title of Action, or Proceeding.*]

Deposition of E F, a witness produced and examined on the — day of —— under and by virtue of a notice, affidavit [and order] to which this deposition is annexed, in the above

entitled action [or proceeding] pending and at issue in the Superior Court of the state of California in the county of ———, between A B, the plaintiff in said action, and C D, the defendant therein [or between A B, the petitioner in said proceeding, and C D, the respondent therein] as follows:

E F, of the [state his residence] aged —— years and upwards, being duly and publicly sworn [or affirmed] doth depose and say in answer to questions on his direct examination, as follows:

Question: [Give question.]

Answer: [Give answer.]

[And so on until his direct examination is completed.]

And on his cross examination said witness doth depose and say as follows:

Question: [Give question.]

Answer: [Give answer.]

[And so on until the cross examination is completed.]

And on his redirect examination said witness doth depose and say as follows:

Question: [Give question.]

Answer: [Give answer.]

[And so on until his redirect examination is completed.]

[And in a similar manner in case of a re-cross examination.]

[*Signature of Witness*] E F.

I, M N, a notary public [or other officer] of the county of ———, California, do certify that E F, the witness, personally appeared before me at my office in said county of ———, on the — day of ——, at — o'clock, — m., and being by me duly sworn, made answer to the several questions asked him as shown by the foregoing deposition, and did depose to the matters contained therein, and that G H appeared for A B, the plaintiff, [or petitioner] in said action, [or proceeding] and I J appeared for C D, the defendant [or respondent] therein.

And I further certify that when the deposition of said witness was completed, it was carefully read to the witness E F, and was corrected by him in each and every particular in which he desired the same to be corrected, and was then subscribed by him; and that the foregoing is the deposition so

corrected and subscribed. And I further certify that said witness endorsed the exhibits marked ——— which are annexed to said deposition, and that I subscribed my name to each exhibit annexed thereto.

[*Seal.*]

[*If the officer have a seal.*]

M N,

Notary Public of the State of California, in the County of ———, [*or other name of office.*]

The deposition should be annexed to said affidavit and to said order of the judge of the court, if there be such order, and to said copy of said notice, and then be placed in an envelope which should be then sealed and directed to the clerk of the court, and deposited in the postoffice, postage prepaid; and the officer taking the deposition should endorse on the envelope the title of the case and: "Deposited in the postoffice at.....this....day of.....by me "

M. N.,

Notary Public (or other name of office :)

This envelope should be so sealed that it could not be opened unless it would appear that it had been opened.

Instead of endorsing the envelope with words showing it had been deposited in the postoffice, the sealed envelope may be handed by the officer taking the deposition to the clerk of the court, or he may transmit the same to the clerk by some safe, private opportunity.

The deposition of a witness can be taken pursuant to a stipulation of counsel.

FORM NO. 184.

STIPULATION OF COUNSEL TO TAKE DEPOSITION.

[*Title of Action, or Proceeding.*]

It is stipulated that the deposition of ———, a witness on behalf of the plaintiff [or defendant] in this action [or proceeding] be taken before ———, Esq., a notary public of the county of ———, in the state of ———, at his office in said county of ———, on the — day of ——, commencing at — o'clock — m.; and that when taken and certified to by said officer and transmitted to the clerk of said court it may be read by either party to the action [or proceeding] as evidence on the trial of the action, [or proceeding] subject, however, to all objections and exceptions that could be taken in case the witness was personally present and testified in the action.

[*Date.*]

G H,

Attorney for Plaintiff.

I J,

Attorney for Defendant.

If parties to an action or proceeding attend at the taking of the deposition of a witness, no objection to the form of a question can be made at the trial of the action or proceeding unless such objection was stated at the time of the examination of the witness; in every other case the same objection may be made and exceptions taken, as could be made and taken in case the witness was personally present and testified on the trial of the action or proceeding.

FORM NO. 185.

AFFIDAVIT AND APPLICATION FOR COMMISSION FOR THE TAKING OF THE DEPOSITION OF A WITNESS WHO RESIDES OUT OF THE STATE.

[*Title of Action, or Proceeding.*]

[*Venue.*]

G H, being duly sworn, says: That he is the attorney for the plaintiff [or petitioner] in the above entitled action [or proceeding] that K L is a material witness for the plaintiff [or petitioner] in said action, [or proceeding] and that said witness resides at ——— in the county of ——— in the state [or territory] of ———; and this affiant asks that a commission issue out of this court to take the deposition of said witness, and that there be attached to such commission interrogatories and cross-interrogatories settled by Hon. ———, judge of said court, on which such deposition is to be taken; that the annexed are interrogatories proposed by the plaintiff on which such deposition is to be taken.

[*Jurat.*] G H.

On notice to the attorney of the adverse party, such commission will be ordered issued by said judge, and the interrogatories and cross-interrogatories on which the deposition is to be taken, will be settled by the judge; and such interrogatories and cross-interrogatories, as so settled, will be attached by the clerk of the court to the commission so issued.

In California such commission will be issued to a person as provided in section 2024 of the Code of Civil Procedure. The person to whom such commission is issued will take, certify to, and return such commission and the deposition thereto attached, to the clerk of the court.

FORM NO. 186.

FORM OF COMMISSION TO TAKE A DEPOSITION.

[*Title of Action, or Proceeding.*]

The People of the State of California to E F: [State his name of office.]

Know ye, that we with full faith in your prudence and competency have appointed you commissioner, and by these presents do authorize you, E F, to administer an oath to, and to examine K L as a witness, and to take his deposition in answer to the interrogatories annexed to this commission, in the issue [or matter] pending between A B, plaintiff, [or petitioner] and C D, defendant, [or respondent] in the above entitled action [or proceeding] in the [state name of court] and to certify the deposition of the witness to this court in a sealed envelope directed to the clerk, and return the same and this commission to said [state name of court.]

This commission, when executed, is to be returned to J K, clerk of said court at [give the city or town and county and state.]

WITNESS Hon. ————, *Judge of the* [*state name of court*] *and the Seal of the Court this — day of* ——.

[*Seal of Court.*]

Attest: J K,
Clerk.

FORM NO. 187.

DEPOSITION OF WITNESS TO BE ANNEXED TO THE COMMISSION.

[*Title of Action, or Proceeding.*]

Deposition of K L, a witness produced and examined this — day of ——, under and by virtue of a commission issued out of the Superior Court of the state of California in the county of ———, and to which this deposition is annexed, in the above entitled action [or proceeding] pending and at issue therein between A B, the plaintiff in said action, and C D, the defendant therein, [or between A B, the petitioner in said proceeding, and C D, the respondent therein] as follows:

K L, of the [state his residence] aged —— years and upwards, being duly and publicly sworn [or affirmed] doth depose and say as follows:

First: To the first interrogatory [state it] he saith: [State his answer.]

Second: To the second interrogatory [state it] he saith: [State his answer; and so on as to all the direct interrogatories.]

First: To the first cross interrogatory [state it] he saith: [Give his answer.]

Second: To the second cross interrogatory [state it] he saith: [Give his answer; and so on as to all the cross interrogatories.]

K L.

State of ———, county of ———, ss.

I, E F, commissioner under the commission hereto annexed, do certify that K L, the witness, personally appeared before me on the — day of —— at ——, in the county of ———, in the state of ———, and being by me duly sworn, made answer to the several interrogatories annexed to the foregoing commission, and did depose to the matters contained in the foregoing deposition. And I further certify that when the deposition was completed it was carefully read to K L, said witness, and was corrected by him in each and every particular which he desired, and it was then subscribed by him; and I certify that the foregoing deposition is the deposition so corrected and subscribed by him. [And I further certify that said witness endorsed the exhibits numbered attached to said deposition.] And I further certify that I have subscribed my name to each half sheet of said deposition; [and to each exhibit] and I further certify that G H, Esq., [or no one] appeared in behalf of the plaintiff, [or petitioner] and I J, Esq., [or no one] appeared in behalf of the defendant [or the respondent] [or the contestant.]

E F.
Commissioner.

The deposition should be annexed to the commission, and then be placed in an envelope, sealed and directed to the clerk of the court issuing the commission, and the commissioner should endorse on the envelope, "Deposited in the postoffice at.....this....day of.....by me.

"E. F., Commissioner."

And the commissioner should deposit the deposition so endorsed in such postoffice, postage prepaid.

This envelope should be so sealed that it could not be opened unless it would appear that it had been opened.

It is not necessary that the interrogations be set out in the deposition, but I am of the opinion that this would be the better practice.

If the commission be issued by a justice's court it must have attached to it a certificate of the county clerk of the county under the seal of the county as follows:

FORM NO. 188.

CERTIFICATE OF COUNTY CLERK OF A COUNTY TO A COMMISSION ISSUED BY A JUSTICE'S COURT.

State of California, county of ———, ss.

I, ———, county clerk of the county of ———, in the state of California, certify that ——— was an acting justice of the peace in said county of ——— at the date of the foregoing commission.

County Clerk of ——— County, in the State of California.

[*Seal.*]

Besides the testimony of witnesses, documentary evidence of records, when properly authenticated, may, when the original record cannot be produced at the trial, when material and relevant, be introduced as evidence on the trial of an action or proceeding. A copy of the documentary evidence should be certified to as in the following forms:

FORM NO. 189.

AUTHENTICATION OF RECORDS AND JUDICIAL PROCEEDINGS OF A COURT OF RECORD OF A SISTER STATE OR OF A TERRITORY OF THE UNITED STATES, OR OF A COUNTRY SUBJECT TO THE JURISDICTION OF THE UNITED STATES.

[Insert copy of record.]

State [or territory] [or country] of ———, county of ———, ss.

I, A B, clerk of the [giving name of court] in the county of ———, in the state [territory] [or country] of ——— do certify that the foregoing are full, true and correct copies of the original records, proceedings, orders, and of the judgment,

in an action [or proceeding] in said court in which C D is plaintiff [or petitioner] and E F is defendant [or respondent.]

Witness my hand and the seal of said court this — day of ——.

A B,
Clerk of [naming the court.]

[*Seal.*]

I, C D, presiding judge of [naming the court] certify that A B, whose genuine signature is annexed to the above certificate, was at the date thereof a clerk of the [name the court] and that the official acts and doings of A B as said clerk are entitled to full faith and credit; and that the foregoing attestation by said clerk is in due form.

Witness my hand this — day of ——.

C D,
Judge of [naming the Court.]

To this certificate of the judge there may be and usually is a certificate of the court as in form No. 191.

FORM NO. 190.

AUTHENTICATION BY COPY OF THE ACTS OF THE LEGISLATURE OF A STATE, TERRITORY, OR COUNTRY SUBJECT TO THE JURISDICTION OF THE UNITED STATES.

[Insert copy.]

State [or territory] [or country] of ———. Office of Secretary of State.

I, C D, secretary of state of ———, do hereby certify that I have compared the foregoing copy with the original statute of said state [territory] [or country] of ———, entitled an act [give the title] approved ———. [Or, if it became a law without an approval] that such act became a law on the — day of ——, and has been ever since in full force and effect in said state [territory] [or country] of ——— as one of the laws and statutes of said state; [or territory] [or country] and that the foregoing is a correct copy of the original act, and of the whole thereof.

In witness whereof I have hereunto set my hand and affixed

the great seal of said state [or territory] [or country] at ——— this — day of ——.

C D,
Secretary of State.

[*Great Seal.*]

FORM NO. 191.

AUTHENTICATION BY COPY OF RECORDS AND BOOKS NOT BEING A JUDICIAL RECORD IN A STATE OR TERRITORY OR OTHER COUNTRY SUBJECT TO THE JURISDICTION OF THE UNITED STATES.

[Insert copy.]

State [or territory] [or country] of ———. Office of Recorder of Deeds of the County of ———, in the state [territory] [or country] of ———.

I, A B, the recorder of deeds of said county of ———, in the state [territory] [or country] of ———, certify that I am the legal keeper of the records and office books kept in the office of the county recorder of the county of ——— in the state [territory] [or country] of ———; and that the foregoing is a full, true and correct copy of the record in said office of a deed [or document, state what it is] and of the whole of the original records of such deed [or document, state what it is] of record in my office as such county recorder. [And I further certify that I, as such recorder, have no seal of office.]

Witness my hand [and seal of office] [if there be such seal] at —— in said county of ——— in the state [or territory or country] of ——— this — day of ——.

A B,
Recorder of Deeds of —— County, in the State [or Territory or Country] of ———.

State [or territory or country] of ———. Office of Secretary of State.

I, C D, the secretary of state of the state [or territory] [or country] of ———, certify that A B, whose genuine signature is to the foregoing certificate was at the date of such certificate the county recorder of the county of ——— in the state [or ter-

ritory or country] of ———, and the keeper of the records and office books kept in the office of the county recorder of said ——— county; and that such office does not appertain to a court; [and that there is no seal of office of said recorder of said ——— county] and I further certify that said attestation by said A B, as such county recorder, is in due form and by the proper officer.

In testimony whereof I have hereunto set my hand and affixed the great seal of the state [or territory] [or country] of ——— at ——— this — day of ——.

[*Seal of State.*]

C D,

Secretary of State of the State [*or Territory*] [*or country*] *of* ———.

Such certificate may be by the governor, chancellor or keeper of the great seal, the great seal of state being thereto affixed, instead of being by the secretary of state; instead of such certificate, the certificate may be by the presiding judge of a court of the county in which the office of the county recorder is situate.

CERTIFICATE OF PRESIDING JUDGE.

State [or territory] [or country] of ———, county of ———.

I, E F, presiding judge of [naming the court] in the county of ———, in the state [or territory] [or country] of ———, certify that A B, whose genuine signature is subscribed to the above certificate, was at the date thereof the county recorder of the county of ———, in the state [or territory] [or country] of ———; that such office does not appertain to a court; [and that there was and is no seal of office of said county recorder] and I further certify that the said attestation of said A B as county recorder is in due form and by the proper officer.

E F,

Presiding judge of [*giving name of Court.*]

To the signature of the judge there should be appended the certificate of the clerk.

State [or territory] [or country] of ———, county of ———.

I, G H, clerk of [giving the name of the court in the county] certify that E F, whose genuine signature is to the above certificate, was at the date thereof and is the presiding judge of said, [giving the name of the court] and is duly commissioned and qualified.

In witness whereof I have signed this certificate and affixed thereto the seal of [giving the name of the court.]

[*Seal of Court.*]

G H,

Clerk of [*giving name of Court.*]

A copy of a book, or of the records in any book of record can be authenticated in like manner.

These forms are based on sections 905 and 906 of the revised statutes of the United States.

FORM NO. 192.

AUTHENTICATION BY COPY OF A JUDICIAL RECORD IN A STATE FOR USE AS EVIDENCE IN THAT STATE.

[Insert Copy.]

State of ———, county of ———.

I, A B, clerk of [state the name of the court] certify that the foregoing copy of the original record of [state the name of court and what the record is] is a full, true and correct copy of such original record, and that I have the legal custody of the original.

In witness whereof I have subscribed this certificate and affixed the seal of said court thereto at ——— this — day of ———.

[*Seal of Court.*]

C D,

Clerk of [*state name of Court.*]

FORM NO. 193.

AUTHENTICATION BY COPY OF A JUDICIAL RECORD OF A FOREIGN COUNTRY.

[Insert copy.]

[Name of country and of county, or other legal subdivision thereof.]

I, A B, clerk of [state the name of court] certify that I am the legal keeper of the records of said court, and that the foregoing is a full, true and correct copy of the original record in said court [state what the particular record is.]

In witness whereof I have signed this certificate and have affixed the seal of said court thereto at ———, the — day of ———.

A B,

[*Seal of Court.*] *Clerk of* [*state name of Court.*]

[Name of country and legal subdivision thereof.]

I, C D, the chief judge [or presiding magistrate] of [state the name of the court] certify that A B, whose signature is to the above certificate, is the clerk of said court, and the legal keeper of the records thereof; and that the signature of said A B to said certificate is his genuine signature, and that the foregoing attestation by him as such clerk is in due form.

C D,

Chief Judge [*or presiding magistrate*] *of* [*state name of Court.*]

CERTIFICATE THERETO OF CONSULAR AGENT.

[Name of country], office of consular agent.

I, E F, certify that I am the consular agent of the United States to [state country and place] and that the signature of C D is the genuine signature of C D, the chief judge [or presiding magistrate] of [state name of court.]

In witness whereof I have signed this certificate and affixed thereto my official seal of office this — day of ——, at ———.

[*Seal.*] E F,

Consular agent of the United States to ———.

This certificate can be made by the minister, ambassador, consul or vice-consul of the United States to such country.

FORM NO. 194.

AUTHENTICATION OF THE ACT OF A MUNICIPAL CORPORATION IN THE STATE OF CALIFORNIA, OR OF A BOARD, OR DEPARTMENT THEREOF.

[To a copy of the act, a certificate is to be made as follows:]

State of California, county of ——, office of [state name of office in full as in form 198.]

I, A B, [giving name of office] certify that I am the legal keeper of the records of the acts of the city council [or board]

[or department] [stating name of board or department] of said [giving name of municipality], and that the foregoing is a true and correct copy of the original act of said city council [or of said board] [or of said department] of said [giving name of municipality] as the same is of record in my office.

[*Date.*]

A B,
[*Name of office.*]

[*Seal.*]

FORM NO. 195.

AUTHENTICATION OF A DOCUMENT IN THE STATE OF CALIFORNIA OTHER THAN AN ACT OF A MUNICIPALITY OR OF A BOARD OR DEPARTMENT THEREOF.

[To a copy of the document, a certificate is to be made, as follows:]

State of California, county of ——, office of [state name of office in full as in form 198.]

I, A B, [giving name of office] certify that I am the legal keeper of an original document, of which the foregoing is a copy, and that said copy is a true and correct copy of said original document.

[*Date.*]

A B,
[*Name of office.*]

[*Seal.*]

FORM NO. 196.

AUTHENTICATION OF A DOCUMENT IN A SISTER STATE OR TERRITORY.

[To a copy of the document certificates are to be made as follows:]

State [or territory] of ———, county of ———, office of [state name of office in full as in form 198.]

I, A B, [giving name of office] certify that I am the legal keeper of the original document, of which the foregoing is a

copy, and that said copy is a true and correct copy of said original document.

[*Date.*] A B,

[*Giving name of office.*]

State [or territory] of ———, office of secretary of state.

I, C D, the secretary of state of the state [or territory] of ———, certify that the foregoing copy is duly certified by A B, the [giving name of office] who is the officer having the legal custody of the original.

In witness whereof I have hereto set my hand and caused the great seal of the state [or territory] of ——— to be affixed this — day of ——.

[*Great Seal of State.*] C D,

Secretary of State.

Instead of such certificate of the secretary of state, the certificate may be by a judge of the Supreme Court, or the judge of the Superior Court, or county court of the county, or by the mayor of a city, in which the legal keeper of the original document holds his office, and attested by the proper seal.

FORM NO. 197.

AUTHENTICATION OF A DOCUMENT IN THE OFFICE OF A DEPARTMENT OF THE UNITED STATES.

[To a copy of the document a certificate is to be made as follows:]

United States of America, office of [giving name of office in full as in form 198.]

I, A B, [giving name of office] certify that the foregoing copy of [state what the original document is] is a true and correct copy of said original document, and that I am the legal custodian of said original document.

A B,

[*Giving his name of office.*]

FORM NO. 198.

AUTHENTICATION OF A PUBLIC RECORD OF A PRIVATE WRITING.

[To a copy of the record a certificate is to be made as follows:]

State of California, county of ———, office of the county recorder in the county of ———, California.

I, A B, county recorder of the county of ———, in the state of California, certify that the foregoing copy is a full, true and correct copy of the original record in my office as such county recorder, of a [giving the name of the private writing] and of the certificate of acknowledgment thereof, recorded in my office as such county recorder; and I certify that I am the legal keeper of such record.

[*Date.*]

A B,

County Recorder of the County of ———, in the State of California.

FORM NO. 199.

AUTHENTICATION OF A TRANSCRIPT OF RECORD AND DOCKET OF A JUSTICE'S COURT IN A SISTER STATE OR TERRITORY.

Insert the transcript of the records and docket subscribed by the justice of the peace and thereto add certificates as follows:

State [or territory] of ———, county of ———, office of justice of the peace in ——— township, in the county of ———, in the state [or territory] of ———.

I, A B, justice of the peace in ——— township, in the county of ———, in the state [or territory] of ———, certify that the foregoing transcript subscribed by me, and to which this certificate is made, is, in all respects a full and correct transcript from the record and docket of myself as a justice of the peace in ———, township ———, in the county of ———, in the state [or territory] of ———, in an action in said justice's court, wherein C D is plaintiff and F F is defendant; of the judgment rendered by me as such justice of the peace in said action; of the proceedings in the action before such judgment; and of

the execution and the return thereon; and that such transcript is subscribed by me as such justice of the peace, and is in all respects true and correct; and that I had as such justice of the peace, jurisdiction of said action.

A B,

Justice of the Peace in ——— township, in the county of ———, in the state [or territory] of ———.

State [or territory] of ———, county of ———.

I, G H, clerk [or prothonotary] of the county of ———, in the state [or territory] of ———, certify that A B, who subscribed the foregoing certificate and transcript, resided at the date of the judgment mentioned in said transcript, in the county of ———, in the state [or territory] of ———; and that he then was, and he is a justice of the peace therein; and that the signatures to said transcript and certificate are his genuine signatures.

In witness whereof I have hereto set my hand and caused the seal of said county of ——— [or the seal of the Court of Common Pleas of said county of ———] [or the seal of the county court of said county of ———] to be hereto affixed this — day of ——.

G H,

Clerk [or prothonotary] of the county of ———, in the state [or territory] of ———.

[*Seal.*]

A certificate of an officer authenticating a copy of a document or record, must be under the seal of the certifying officer, if he have a seal; or if he be a clerk of a court having a seal, it must be under the seal of such court.

Since the copy of a private document certified to by an officer having the legal custody of the original document, from which such copy was made, can have no greater effect as evidence, except as otherwise provided by statute, than the original would have had if produced as evidence, the genuineness and due execution of said original document must, unless the same be admitted, or unless othewise provided by statute, be proven.

In California, by statute, a duly certified record of a private writing and of the certificate of the acknowledgment thereof is admissible in evidence by statute without further proof of the execution of the original.

Code of Civil Procedure, Sec. 1951.

FORMS OF VERDICT, OF DECISION OF THE COURT, AND OF JUDGMENTS.

FORM NO. 200.

FORM OF VERDICT OF A JURY IN FAVOR OF PLAINTIFF FOR THE RECOVERY OF MONEY.

[*Name of Court.*]

We, the jury, find for the plaintiff for —— dollars, [payable in gold coin of the United States.]

_____,

Foreman.

If the money recovered be not payable in United States gold coin, the words in the parenthesis should be omitted.

FORM NO. 201.

FORM OF VERDICT OF A JURY IN FAVOR OF PLAINTIFF FOR THE RECOVERY OF PERSONAL PROPERTY WHICH HAS NOT BEEN DELIVERED TO PLAINTIFF.

[*Name of Court.*]

We, the jury, find for the plaintiff, and we find that the value of the property sued for in this action is —— dollars, and we assess the damages of plaintiff from the withholding from him of said property at —— dollars.

_____,

Foreman.

FORM NO. 202.

VERDICT OF JURY IN FAVOR OF THE PLAINTIFF FOR A PART OF PERSONAL PROPERTY SUED FOR WHEN THE PROPERTY SUED FOR HAS NOT BEEN DELIVERED TO PLAINTIFF.

[*Name of Court.*]

We, the jury, find for the plaintiff for all the property sued for in the action with the exception of one cow, and we find the value of the property sued for in this action, with the exception of said cow, is —— dollars, and we assess the damages of the

plaintiff from the withholding from him of his said property at —— dollars.

_____,
Foreman.

FORM NO. 203.

GENERAL VERDICT FOR THE DEFENDANT.

[*Name of Court.*]

We, the jury, find for the defendant.

_____,
Foreman.

FORM NO. 204.

VERDICT OF JURY IN FAVOR OF DEFENDANT WHEN THE PROPERTY SUED FOR HAS BEEN TAKEN FROM THE DEFENDANT, AND HE HAS DEMANDED IN HIS ANSWER, A RETURN THEREOF.

[*Name of Court.*]

We, the jury, find for the defendant; and we find that defendant is entitled to the return of the property sued for, and that the value of the property sued for is —— dollars; and we assess the damages of defendant from the taking and withholding of said property from him at —— dollars.

_____,
Foreman.

FORM NO. 205.

VERDICT OF JURY WHEN PROPERTY SUED FOR HAS BEEN DELIVERED TO PLAINTIFF AND DEFENDANT DEMANDS RETURN THEREOF IN HIS ANSWER, AND THE JURY FINDS FOR PLAINTIFF AS TO SOME OF THE PROPERTY AND FOR DEFENDANT AS TO SOME.

[*Name of Court.*]

We, the jury, find for the plaintiff for the horses sued for, and we find that the value of the horses sued for is —— dollars,

and we assess the damages of plaintiff from the withholding from him of these horses, at —— dollars;

And we find for the defendant, that he is entitled to the return of the cows sued for, and we find their value is —— dollars; and we assess the damages of defendant from the taking and the withholding from him of these cows at —— dollars.

——————,

Foreman.

FORM NO. 206.

GENERAL VERDICT OF THE JURY FOR PLAINTIFF IN THE ACTION OF EJECTMENT.

[*Name of Court.*]

We, the jury, find for plaintiff.

——————,

Foreman.

FORM NO. 207.

VERDICT OF JURY IN THE ACTION OF EJECTMENT AND FINDING THE VALUE OF THE USE AND OCCUPATION OF THE LAND, AND DAMAGES FROM WASTE.

[*Name of Court.*]

We, the jury, find for plaintiff, and find that the value of the use and occupation of the property sued for, while the same was withheld from plaintiff by defendant, is —— dollars; and we find that waste was committed thereon by defendant, and we assess the damages of plaintiff from such waste at —— dollars.

——————,

Foreman.

On the rendering and filing the verdict of the jury, unless the case be reserved for argument or further consideration, and on the filing of the finding of the court ordering judgment, judgment should, in common law actions, be entered by the clerk.

In common law actions judgments are not signed by the judge, but in other actions they are.

In common law actions a judgment is the sentence of the law pronounced by the court upon the matter contained in the record. In such actions, when the verdict is rendered, or the decision of the court is made and filed, judgment is entered by the clerk in accordance with established forms.

The finding of the court is its decision, and unless such finding be waived, the finding of facts should be of each material ultimate fact in issue.

FORM NO. 208.

FINDING BY THE COURT IN AN ACTION BROUGHT ON A PROMISSORY NOTE.

[*Name of Court.*]

This action coming on regularly on the — day of —— for trial by the court, without a jury, G H, Esq., appearing for the plaintiff, and I J, Esq., appearing for the defendants, and evidence having been introduced, and the cause having been argued by counsel of the respective parties, and submitted to the court for decision, the court finds the following facts:

I.

That the promissory note sued on in this action was made by the defendant, and was delivered by him to the plaintiff on the — day of ——, and plaintiff has never sold, endorsed or transferred the same, and the complaint in the action contains a correct copy of said promissory note;

II.

That on the — day of —— defendant paid to plaintiff on said promissory note the sum of —— dollars, and there has never been any other or further payment thereon;

And the court finds as a conclusion of law that there is due and unpaid to plaintiff from defendant on said promissory note, the sum of —— dollars, and that plaintiff is entitled to judgment against defendant therefor and costs.

Let judgment be entered accordingly.

[*Date.*]

————,
Judge.

FORM NO. 209.

FINDING OF THE COURT IN AN ACTION BROUGHT ON A PROMISSORY NOTE AND ON A MORTGAGE.

[*Name of Court.*]

This action coming on regularly on the — day of ——, to be tried by the court, G H, Esq., appearing as counsel for the plaintiff, and I J, Esq., appearing as counsel for the defendants, ———, and evidence having been introduced, and the cause hav-

ing been argued by counsel of the respective parties, and submitted to the court for decision, the court finds the following facts:

I.

That on the — day of —— the defendant C D made and delivered to plaintiff the promissory note, a correct copy of which is contained in the complaint, and on the same day the defendant C D, to secure the payment of said promissory note, [and the costs and expenses of collecting the same] made a mortgage, and acknowledged the execution thereof, and had a certificate of such acknowledgment endorsed thereon, [or attached thereto] and then delivered to plaintiff said mortgage, a true copy of which, and of the certificate of such acknowledgment, endorsed thereon [or attached thereto] is contained in the complaint in this action; and plaintiff on the — day of —— had the same recorded in the office of the county recorder of ——— county, in this state, the county in which the land embraced in said mortgage is situated;

II.

That the following payments have been made on said promissory note, namely: One payment of —— dollars made on the — day of ——; one payment of —— dollars made on the — day of ——; and no other or further payment has been made on said promissory note nor on said mortgage;

III.

[That said mortgagor has not insured, nor caused to be insured, the buildings on said mortgaged property from damage by fire, and plaintiff did for his better security, on the — day of —— insure said buildings from fire, and he paid out for that purpose on that day the sum of —— dollars, which was a reasonable sum therefor, and which has not, nor has any part thereof been repaid to plaintiff] [and plaintiff , before the commencement of this action, had the records in respect to such mortgaged property searched from the time of the making and delivery of said mortgage, and paid out for that purpose the sum of —— dollars, which is a reasonable compensation for that purpose; and said sums have not nor has any part thereof been paid to plaintiff by the defendant C D;]

IV.

That on the — day of ——, the time of the commencement of this action, plaintiff filed for record and had recorded in the office of the county recorder in said county of ———, a notice of the pendency of the action, containing the names of the parties thereto and the object of the action and a description of the property affected thereby;

V.

That plaintiff has employed an attorney at law to collect the money due on said promissory note, and to procure the foreclosure and sale of said mortgaged premises, and promised to pay him a reasonable compensation for such services; and the sum of —— dollars is a reasonable compensation for such services;

VI.

That said defendants, J K, L M and N O have or claim to have, and each of them has or claims to have, an interest in, or claim upon said mortgaged premises, or some part thereof, and that such interest, or claim, is subsequent to said mortgage, and is subject thereto;

And as conclusions of law the court finds that the defendant C D is indebted to plaintiff in the sum of —— dollars on the note and mortgage described in the complaint, for the unpaid principal and interest on said promissory note, [and in the further sum of —— dollars, for money expended by plaintiff for insuring the buildings on said mortgaged premises, and for the searching of the records of said mortgaged premises subsequent to the making of said mortgage] and in the further sum of —— dollars, the reasonable fee of plaintiff's attorney in this action, and plaintiff's costs of suit, taxed at —— dollars; that said sums are a lien on said mortgaged premises; and that plaintiff is entitled to have and recover from the defendant C D said sums of money and said costs of suit, and to have the mortgaged premises sold to pay the same, or to have so much thereof sold as will pay the same; and if the proceeds of said sale will not be sufficient to pay the same in full, and a balance thereof still remains due, that plaintiff is entitled to have a judgment docketed against the defendant C D for such deficiency; and that plaintiff is entitled to a judgment against the defendants, J

K, L M and N O, and against each of them, that their interest in or claim upon said mortgaged premises, or any part thereof, and that such interest or claim of each of them is subsequent to the mortgage sued on, and subject thereto; and that if the proceeds of such sale do not pay said sums and a deficiency remains plaintiff have judgment against the defendant C D for such deficiency.

Let judgment be entered accordingly.

[*Date.*] ————,

Judge.

If the fee of plaintiff's attorney or any other money found due plaintiff be not a lien by the mortgage on the mortgaged premises, then this form of finding is to be changed so as to be in accordance with the facts proven.

See Klokke v. Escallier,, 124 Cal. 297.

FORM NO. 210.

JUDGMENT ENTERED ON A MONEY VERDICT BY A JURY IN FAVOR OF PLAINTIFF.

[*Name of Court.*]—JUDGMENT.

This cause coming on the — day of ——, regularly to be tried by a jury duly impaneled and sworn, G H, Esq., appearing as counsel for the plaintiff, and I J, Esq., appearing as counsel for the defendant, and evidence having been introduced, and the cause having been argued by counsel for the respective parties, and submitted to the jury, and the jury having rendered a verdict in the action in favor of the plaintiff therein for the sum of —— dollars;

THEREFORE IT IS ADJUDGED that A B, the plaintiff in the action, have and recover from C D, the defendant in the action, —— dollars, and plaintiff's costs of suit taxed at —— dollars.

Judgment entered this — day of ——.

FORM NO. 211.

JUDGMENT ON THE VERDICT OF A JURY IN FAVOR OF PLAINTIFF FOR PERSONAL PROPERTY, AND FOR DAMAGES.

[*Name of Court.*]—JUDGMENT.

This cause coming on the — day of ——, regularly to be tried by a jury duly impaneled and sworn, G H, Esq., appearing as counsel for the plaintiff, and I J, Esq., appearing as counsel for the defendant, and evidence having been introduced, and the cause having been argued by counsel for the respective parties, and submitted to the jury, and the jury having rendered a verdict in the action in favor of the plaintiff, and having found in their verdict that the value of the property sued for is —— dollars, and having in their verdict assessed the damages of plaintiff for the withholding of said property at —— dollars;

THEREFORE IT IS ADJUDGED that A B, the plaintiff in the action, have and recover from the defendant C D, the possession of [describe the property as in the complaint] or —— dollars, the value thereof, in case a delivery cannot be had; and —— dollars' damages for the detention thereof, and plaintiff's costs in the action, taxed at —— dollars.

Judgment entered this — day of ——.

FORM NO. 212.

JUDGMENT ON VERDICT OF A JURY IN FAVOR OF DEFENDANT FOR PERSONAL PROPERTY TAKEN FROM HIM IN THE ACTION, AND FOR DAMAGES.

[*Name of Court.*]—JUDGMENT.

This cause coming on the — day of ——, regularly to be tried by a jury duly impaneled and sworn, G H, Esq., appearing as counsel for the plaintiff, and I J, Esq., appearing as counsel for the defendant; and evidence having been introduced, and the cause having been argued by counsel for the respective parties, and submitted to the jury, and the jury having rendered their verdict in the action, and having found in favor of the defendant, and that he is entitled to the return of the property

sued for, and that the value of said property is —— dollars; and having assessed the damages of the defendant for the taking and detention of said property at —— dollars; and said property having been taken under proceedings in this action from the possession of the defendant, and said defendant having in his answer demanded the return thereof,

THEREFORE IT IS ADJUDGED that C D, the defendant in the action, have and recover from A B, the plaintiff in the action, the possession of [describe the property as in the complaint], or —— dollars, the value thereof, in case a delivery cannot be had; and —— dollars, damages for the taking and detention thereof, and defendant's costs in the action, taxed at —— dollars.

Judgment entered this — day of ——.

FORM NO. 213.

JUDGMENT WHEN THE JURY HAS FOUND FOR THE PLAINTIFF FOR A PORTION OF PERSONAL PROPERTY SUED FOR, AND FOR THE DEFENDANT FOR THE RESIDUE.

[*Name of Court.*]—JUDGMENT.

This cause having on the — day of ——, regularly come on to be tried by a jury duly impaneled and sworn, G H, Esq., appearing as counsel for the plaintiff, and I J, Esq., appearing as counsel for the defendant, and evidence having been introduced, and the cause having been argued by counsel, and submitted to the jury, and the jury having rendered their verdict for the plaintiff for the eight horses sued for in the action, and having found that the value of the eight horses is —— dollars, and having assessed the damages of plaintiff at —— dollars for the detention thereof, and the jury having rendered their verdict for the defendant for the return to defendant of the cows sued for in the action, and having found that their value is —— dollars, and having assessed the damages of the defendant at —— dollars for the taking and detention thereof, and said property sued for having been taken from the defendant under proceedings in the action, and the defendant having demanded in his answer a return of the property sued for,

THEREFORE IT IS ADJUDGED that the plaintiff have and recover from the defendant possession of the eight horses sued for [describing them as in the complaint] or —— dollars, the value thereof in case a delivery thereof cannot be had, and —— dollars, damages for the detention thereof;

AND IT IS FURTHER ADJUDGED that the defendant have and recover from the plaintiff the possession of the cows sued for in the action, [describing them as in the complaint] or —— dollars, the value thereof in case a delivery cannot be had; and —— dollars, the damages for the taking and detention thereof;

AND IT IS FURTHER ADJUDGED that ——— recover from ——— costs in this action taxed at —— dollars.

Judgment entered this — day of ——.

In a judgment of the kind mentioned in the foregoing form, the code does not appear to be clear as to the judgment for costs, and probably the judgment for costs should be as ordered by the court.

FORM NO. 214.

JUDGMENT ON THE VERDICT OF A JURY FOR THE POSSESSION OF LAND, AND FOR THE VALUE OF THE USE AND OCCUPATION THEREOF.

[*Name of Court.*]—JUDGMENT.

This cause having on the — day of ——, regularly come on to be tried by a jury, duly impaneled and sworn, G H, Esq., appearing as counsel for the plaintiff, and I J, Esq., appearing as counsel for the defendant: and evidence having been introduced, and the cause having been argued by counsel and submitted to the jury, and the jury having rendered their verdict for the plaintiff, and found that the value of the use of property sued for during the time it was withheld by defendant from plaintiff was —— dollars;

THEREFORE IT IS ADJUDGED that A B, the plaintiff in the action, have and recover from C D, the defendant in the action, the possession of [describe the property as it is described in the complaint] and the sum of —— dollars for the use thereof, and plaintiff's costs of suit taxed at —— dollars.

Judgment entered this — day of ——.

FORM NO. 215.

JUDGMENT AGAINST THE EXECUTOR OR ADMINISTRATOR OF THE ESTATE OF A DECEDENT.

[*Name of Court.*]—JUDGMENT.

This cause having on the — day of ——, regularly come on to be tried by a jury, duly impaneled and sworn, G H, Esq., appearing as counsel for plaintiff, and I J, Esq., appearing as counsel for the defendant; and evidence having been introduced, and the cause having been argued by counsel and submitted to the jury, and the jury having rendered a verdict for the plaintiff in the action, and for the sum of —— dollars;

THEREFORE IT IS ADJUDGED that A B, the plaintiff in the action, have and recover the sum of —— dollars, and plaintiff's costs taxed at —— dollars, to be paid in the due course of administration of the estate of ———, deceased.

Judgment entered this — day of ——.

FORM NO. 216.

JUDGMENT OF DISMISSAL OF AN ACTION, ENTERED BY THE CLERK.

[*Name of Court.*]—JUDGMENT.

A B, the plaintiff in this action, having filed in this action his written request that the action be dismissed, and having paid the costs in the action, now, on motion of G H, attorney for plaintiff, judgment is entered in the action that the action be and it is dismissed.

Judgment entered this — day of ——.

FORM NO. 217.

JUDGMENT OF DISMISSAL OF AN ACTION ORDERED BY THE COURT.

[*Name of Court.*]—JUDGMENT.

This cause having been regularly set for trial on the — day of —— at — o'clock — m., and the plaintiff having failed to appear at the trial, and the defendant having asked that the

action be dismissed for such failure, and having moved the court to dismiss the action, and said motion having been granted,

THEREFORE IT IS ADJUDGED that the action be, and the same is dismissed, and that C D, the defendant in the action, have and recover from A B, the plaintiff therein, defendant's costs of suit taxed at —— dollars.

Judgment entered this — day of ——.

FORM NO. 218.

JUDGMENT OF DISMISSAL WHEN THE PLAINTIFF HAS FAILED TO PROVE A SUFFICIENT CASE FOR THE JURY.

[*Name of Court.*]—JUDGMENT.

This action having on the — day of —— come on regularly to be tried by a jury, duly impaneled and sworn, G H, Esq., appearing as counsel for plaintiff, and I J, Esq., appearing as counsel for the defendant, and the plaintiff having introduced evidence on his part, and having rested, and the defendant having moved the court for judgment of dismissal of the action upon the ground that the plaintiff had failed to prove a sufficient case for the jury, and said motion having been granted by the court,

THEREFORE IT IS ADJUDGED that this action be and the same is dismissed; and that C D, the defendant in the action, have and recover from A B, the plaintiff in the action, the defendant's costs of suit taxed at —— dollars.

Judgment entered this — day of ——.

FORM NO. 219.

JUDGMENT ON FINDING OF COURT.

[*Name of Court.*]—JUDGMENT.

This action having on the — day of —— regularly come on to be tried by the court, G H, Esq., appearing as counsel for plaintiff, and I J, Esq., appearing as counsel for the defendant; and evidence having been introduced, and the cause having been argued by counsel, and having been submitted to the court for its decision, and the court having filed its decision in favor of

plaintiff for the sum of —— dollars, and having ordered judgment accordingly,

THEREFORE IT IS ADJUDGED that the plaintiff, A B, have and recover from the defendant, C D, —— dollars, and plaintiff's costs of suit taxed at —— dollars.

Judgment entered this — day of ——.

FORM NO. 220.

JUDGMENT WHEN FINDINGS ARE WAIVED.

[*Name of Court.*]—JUDGMENT.

This action having on the — day of —— regularly come on to be tried by the court, G H, Esq., appearing as counsel for plaintiff, and I J, Esq., appearing as counsel for defendant; and evidence having been introduced, and the cause having been submitted to the court for its decision, and the parties to the action having waived findings, and the court having ordered judgment in favor of plaintiff for —— dollars,

THEREFORE IT IS ADJUDGED that A B, the plaintiff in the action, have and recover from C D, the defendant in the action, —— dollars, and plaintiff's costs of suit taxed at —— dollars.

Judgment entered this — day of ——.

FORM NO. 221.

JUDGMENT IN AN ACTION OF FORECLOSURE AND SALE WHEN SALE IS BY A COMMISSIONER.

[*Name of Court.*]—JUDGMENT.

The summons in this action having been duly served on the defendants in the action, [and the default of the defendants ——— having been duly entered for failure to appear and answer] and the action on the — day of —— coming on regularly for trial by the court, G H, Esq., appearing as counsel for plaintiff, and I J, Esq., appearing as counsel for the defendants, ———; and evidence having been introduced, and the cause having been argued by counsel and submitted to the court for its decision, and the court having filed its written decision in the

action in favor of the plaintiff, and ordered judgment in accordance therewith;

THEREFORE IT IS ADJUDGED AND DECREED that the plaintiff, A B, have and recover from the defendant C D, the sum of —— dollars, and the interest thereon at the rate of seven per cent. per annum from the date of this judgment, and plaintiff's costs of suit taxed at —— dollars;

[And the sum of —— dollars, the reasonable fee of the attorney for the plaintiff in this action;]

And that said sums of —— dollars [and of —— dollars] and said costs of suit and said interest, are a lien on the mortgaged premises described in the complaint and hereinafter described; and that said mortgaged premises, or so much thereof as it may be necessary to sell, to pay from the proceeds of the sale the fee of the commissioner hereinafter appointed to make such sale, the costs and expenses of the sale, and to pay said sum of —— dollars and said interest thereon from the date of this judgment; [and said sum of —— dollars] and said costs of suit, be sold in the manner prescribed by law by the commissioner hereinafter appointed to make such sale; and that any party to the action may be a purchaser at such sale; and that ——— Esq., is appointed a commissioner to make such sale, and before he enters on his duties as such commissioner he shall be sworn to perform his duties as such commissioner faithfully, and he is required to give an undertaking with sufficient sureties, to be approved by the court, in the sum of —— dollars, to the effect that he will faithfully perform his duties as commissioner according to law: and the compensation of said commissioner is fixed at —— dollars;

IT IS FURTHER ADJUDGED AND DECREED that if the proceeds of such sale be insufficient to pay the commissioner's fee, the costs and expenses of sale, and said sum of —— dollars and said interest thereon from the date of this judgment, [and said sum of —— dollars] and said costs of suit, and a balance remains due and unpaid, that the commissioner in his report of the sale, report the amount of such balance remaining due and unpaid, and that judgment be docketed in favor of the plaintiff, and against the defendant C D, for the amount of such balance remaining due and unpaid, and that plaintiff have execution therefor;

IT IS FURTHER ADJUDGED AND DECREED that said commissioner, after the time for the redemption of the property sold as prescribed by statute has expired, and there has been no redemption of such property, or of any of it, as prescribed by statute, make to the purchaser at such sale, or to his assignee of the certificate of purchase issued to the purchaser on such sale, a commissioner's deed of the property so sold, and which has not been so redeemed, and that on the presentation of such deed to the person in possession of said mortgaged premises, or of the part thereof embraced in said deed, he, on demand, surrender such possession to the party entitled thereto under said commissioner's deed;

And if the proceeds of such sale pay the sums of money by this decree ordered to be paid therefrom, and a surplus of such proceeds remain,

IT IS ADJUDGED AND DECREED that such surplus be paid to the defendant, ———, [or paid into court to abide the further order and direction of the court;]

IT IS FURTHER ADJUDGED AND DECREED that the interest in, or claim upon said mortgaged premises, or on any of it, of the defendants, K L, M N and O P, or of either or of any of them, is subsequent to plaintiff's mortgage described in the complaint and is subject thereto;

AND IT IS FURTHER ADJUDGED AND DECREED that after the making of said commissioners' deed, the defendants in this action, and any of them, and each of them, and all persons claiming under them, or any or either of them, by conveyance, assignment, mortgage or otherwise, subsequent to the commencement of this action, or which had been made prior to the commencement of this action, and which was unrecorded at the time of the commencement of this action, be barred of all equity of redemption in and to the said mortgaged premises embraced in said commissioner's deed, or any part thereof.

The following is the description of said mortgaged premises described in the complaint, and by this judgment adjudged and decreed to be sold: [Describe the premises.]

[*Date.*] ————,

Judge.

FORM NO. 222.

JUDGMENT IN ACTION OF FORECLOSURE AND SALE WHEN SALE IS MADE BY A SHERIFF.

[*Name of Court.*]—JUDGMENT.

The summons in this action having been duly served on the defendants in the action, [and the default of the defendants, ———, having been duly entered for failure to appear and answer] and the action on the — day of —— coming on regularly for trial by the court, G H, Esq., appearing as counsel for plaintiff, and I J, Esq., appearing as counsel for the defendants, ———; and evidence having been introduced, and the cause having been argued by counsel and submitted to the court for its decision, and the court having filed its written decision in the action in favor of the plaintiff, and ordered judgment in accordance therewith;

THEREFORE IT IS ADJUDGED AND DECREED that the plaintiff, A B, have and recover from the defendant, C D, the sum of —— dollars, and the interest thereon at the rate of seven per cent. per annum from the date of this judgment, and plaintiff's costs of suit taxed at —— dollars; [and the further sum of —— dollars, the reasonable fee of the attorney for the plaintiff in this action] and that said sum of —— dollars, and said interest thereon, and said costs of suit, [and said sum of —— dollars] are a lien on the mortgaged premises described in the complaint and hereinafter described; and that said mortgaged premises, or so much thereof as it may be necessary to sell, to pay from the proceeds of the sale, the costs and expenses of the sale, and to pay said sum of —— dollars and said interest thereon, from the date of this judgment, and said costs of suit, [and said sum of —— dollars] be sold in the manner prescribed by law by the sheriff of the county in which said mortgaged property, or some part thereof, is situated; and that any party to this action may be a purchaser at such sale;

IT IS FURTHER ADJUDGED AND DECREED that if the proceeds of such sale be insufficient to pay the costs and expenses of the sale, and said sum of —— dollars, and said interest thereon from the date of this judgment, and said costs of suit, [and said sum of —— dollars] and a balance remains due and unpaid, that

said sheriff, in his return of the sale, return the amount of such balance remaining due and unpaid, and that judgment be docketed in favor of the plaintiff and against the defendant C D, for the amount of such balance remaining due and unpaid, and that plaintiff have execution therefor;

IT IS FURTHER ADJUDGED AND DECREED that said sheriff, after the time for the redemption of the property sold as prescribed by statute has expired, and there has been no redemption of said property, or of any of it, as provided by statute, make to the purchaser at such sale, or to his assignee of the certificate of purchase issued to such purchaser, a sheriff's deed of the property so sold, and which has not been so redeemed; and that on the presentation of such deed to the person in possession of the mortgaged property, or of the part thereof embraced in such deed, he, on demand, surrender such possession to the party entitled thereto under said sheriff's deed;

IT IS FURTHER ADJUDGED AND DECREED that if the proceeds of such sale pay the money ordered by this decree to be paid therefrom, and a surplus of such proceeds remain, that such surplus be paid to the defendant C D; [or paid into court to abide the further order and direction of the court.]

IT IS FURTHER ADJUDGED AND DECREED that the title to, interest in, or claim upon said mortgaged premises, or on any of it, by the defendants K L, M N and O P, or by either or any of them, is subsequent to the mortgage described in the complaint and is subject thereto;

AND IT IS FURTHER ADJUDGED AND DECREED that the defendants in this action, and each of them, and all persons claiming under them, or under any or either of them by conveyance or assignment, or otherwise, made subsequent to the commencement of this action, or which had been made prior to the commencement of this action, and was unrecorded at the commencement of this action, be, after the making of said sheriff's deed, barred of all equity of redemption in or to said mortgaged premises, or any part thereof which is embraced in said sheriff's deed.

The following is a description of the mortgaged premises

described in the complaint in this action, and by this judgment adjudged and decreed to be sold. [Describe the premises.]

[*Date.*] ————,

Judge.

FORM NO. 223.

JUDGMENT IN ACTION TO QUIET TITLE.

[*Name of Court.*]—JUDGMENT.

The summons in this action having been duly served on the defendants in this action, and the default of the defendants ———, for failure to appear and answer in the action having been duly entered, and the defendant ——— having in his answer disclaimed any interest or estate in the property described in the complaint, and the action on the — day of —— coming on regularly to be tried by the court, G H, Esq., appearing as attorney for the plaintiff, and I J, Esq., appearing as attorney for the defendants ———; and evidence having been introduced and the cause having been argued by the attorneys of the respective parties and submitted to the court for decision, and the court having filed its written decision in favor of the plaintiff and ordered judgment in accordance therewith;

IT IS THEREFORE ADJUDGED AND DECREED that the plaintiff was at the commencement of the action, and is the owner in fee of the real estate described in the complaint, and which is described therein as the: [describe the property as in the complaint.]

And that the defendants have no estate or interest in the real estate described in the complaint, and have no lien thereon; and no one, or any of said defendants, has or have any estate or interest in said real estate, or any lien thereon; and plaintiff's title to said real estate is quieted, and is good and valid against each and all of said defendants; and all adverse claims of each and all of the defendants to said real estate, or to any part thereof, are invalid and groundless, and said defendants are, and each of them is, perpetually enjoined from setting up the same;

AND IT IS FURTHER ADJUDGED AND DECREED that plaintiff

have and recover from the defendant ——— plaintiff's costs in this action taxed at —— dollars.

[*Date.*]

———,
Judge.

FORM NO. 224.

JUDGMENT IN ACTION FOR A DIVORCE.

[*Name of Court.*]—JUDGMENT.

The summons in this action having been duly served on the defendant in the action, and the default of the defendant for failure to appear and answer having been duly entered [or the defendant having appeared and answered in the action] and the action coming on regularly on the — day of —— to be tried by the court, G H, Esq., appearing as the attorney for the plaintiff, no one appearing as the attorney for the defendant; [or I J, Esq., appearing as the attorney for the defendant] and evidence having been duly introduced and the cause having been argued by counsel and submitted to the court for decision, and the court having filed its written decision in favor of the plaintiff in the action, and having ordered judgment in accordance therewith;

THEREFORE IT IS ADJUDGED AND DECREED that the bonds of marriage between the plaintiff A B, and the defendant C D, be and they are dissolved, and they are, and each of them is, absolved from all the obligations thereof;

[IT IS FURTHER ADJUDGED AND DECREED that the custody of ———, the minor child of the parties to this action, be and is awarded, until the further order of the court, to A B, the plaintiff, with the privilege to the defendant of visiting and having the society of said minor child at all reasonable times; and that the defendant C D pay to the plaintiff A B, until otherwise directed by the order of the court, for her support and for the custody, care and education of said minor child, the sum of —— dollars on the first Monday of each and every month from and after the date of this judgment;]

AND IT IS FURTHER ADJUDGED AND DECREED that plaintiff have and recover from the defendant plaintiff's costs in this action taxed at ——— dollars.

[*Date.*]

———,
Judge.

When the judgment is signed by the judge of the court and entered in the judgment book, the clerk should state in the judgment book the time of such entry.

FORMS ON A MOTION FOR A NEW TRIAL AND ON APPEAL

The judgment of a trial court is not final when rendered.

A party to an action who is dissatisfied with the judgment rendered in the action, may appeal from the judgment, or move the trial court for a new trial in the action, or he may do both.

If he appeal from the judgment, he may within the time prescribed by statute, or by an order of the trial court or of the judge thereof, when made in due time, prepare, and have settled and allowed by the judge thereof, as provided by law, a bill of exceptions to be used on such appeal.

The same bill of exceptions may be used in the trial court on his motion for a new trial, if he make such motion as prescribed by statute. If his exception is to the verdict or decision in the case on the ground that it is not justified by the evidence, such exception cannot be reviewed on such appeal from the judgment unless the appeal was taken within sixty days after the rendition of the judgment.

If the party does not move for a new trial, and does not take the proper steps therefor, as prescribed by statute, and he does not appeal from the judgment within the time prescribed by statute, then the judgment of the trial court becomes final.

If there has been no appeal from the judgment within the time prescribed by statute, and there has been a motion for a new trial of the action, and such motion has been denied by the court, and no appeal has been taken from the order denying such motion within the time prescribed by statute, then the judgment of the trial court is final.

FORM NO. 225.

GENERAL FORM FOR A BILL OF EXCEPTIONS TO BE USED ON AN APPEAL FROM A JUDGMENT FOR PLAINTIFF, AND WHICH MAY ALSO BE USED ON A MOTION FOR A NEW TRIAL.

[*Name of Court.*] PROPOSED BILL OF EXCEPTIONS OF DEFENDANT.

Be it remembered that on the trial of said action the following occurred:

The action came on regularly to be tried by the court [or by a jury who were duly impaneled and sworn] G H, Esq., appearing as attorney for the plaintiff, and I J, Esq., appearing as the attorney for the defendant; witnesses were sworn and examined, and the cause was argued by counsel for the respective parties, and was then submitted to the court [or jury] for decision; and the court rendered its decision [or the jury found a verdict] in favor of the plaintiff;

E F, a witness called by the plaintiff, was sworn and examined, and testified in substance as follows: [state the substance

of the testimony of the witness and the decisions of the court in respect to the testimony of such witness, and the exceptions thereto, when the testimony of such witness was given, and so on in respect to the testimony of each material witness;]

The defendant specifies and will rely on the following particulars in which the evidence is insufficient to justify the decision of the court; [or the verdict of the jury]

First. The evidence does not prove [state the particular fact which the evidence does not prove] and which was necessary to be proven in order to justify such decision; [or verdict]

Second. The evidence does not prove [state a material fact which the evidence does not prove] and which was necessary to be proven to justify such decision; [or verdict] [and so on as to each material fact which the evidence does not prove] and the defendant specifies and will rely on the following errors in law in the decision of the court on the trial of the action, and which were excepted to by the defendant; [specify each error in law so relied on.]

[*Date.*]

I J,
Attorney for Defendant.

FORM NO. 226.

EVIDENCE OF SERVICE OF BILL OF EXCEPTIONS ENDORSED THEREON.

Received the within [or a copy of the within] bill of exceptions this — day of ——.

G H,
Attorney for Plaintiff.

FORM NO. 227.

AMENDMENTS TO BILL OF EXCEPTIONS.

[*Name of Court.*]

The plaintiff proposes the following amendments to defendant's proposed bill of exceptions in this action:

First. Strike out the words " [state the words] " in line —

on page — of said bill of exceptions, and insert in place thereof the words " [state the words.] "

Second. Strike out all of said bill of exceptions commencing with the word, " [state it] " in line —, on page —, of the bill of exceptions, and ending with the word, " [state it] " in line —, on page — thereof.

Third. After the word, "[state it]" in line —, on page —, insert the words, " [state them] " [and so on as to each proposed amendment.]

[*Date.*]

G H,
Attorney for Plaintiff.

FORM NO. 228.

EVIDENCE OF SERVICE OF AMENDMENTS TO BILL OF EXCEPTIONS ENDORSED THEREON.

I admit service of the within, [or of a copy of the within] proposed amendments to the defendant's bill of exceptions this — day of ——.

I J,
Attorney for Defendant.

FORM NO. 229.

NOTICE OF PRESENTATION OF BILL OF EXCEPTIONS FOR SETTLEMENT AND ALLOWANCE.

[*Name of Court.*]

You are notified that defendant will, on the — day of ——, at — o'clock — m., present to the Hon. ———, judge of said court, at his chambers, defendant's proposed bill of exceptions, and the proposed amendments thereto, to be settled by him, and when settled to be allowed by him.

[*Date.*]

I J,
Attorney for Defendant.

To G H, Esq.,
Attorney for Plaintiff.

When the bill of exceptions is presented for settlement there should be presented therewith evidence that such notice was served.

When the bill of exceptions is settled, and has been engrossed as settled, the judge should sign the bill as so engrossed with his certificate to the effect that the same is allowed, and the same so signed should be filed with the clerk of the court.

After judgment, the party intending to move the trial court for a new trial must file and give notice of his intention to do so.

FORM NO. 230.

NOTICE OF INTENTION TO MOVE FOR A NEW TRIAL.

[*Name of Court.*]

You will take notice that the plaintiff [or defendant] in this action intends to move for a new trial therein, and on the following grounds, namely:

First. Irregularity in the proceedings of the court, in the proceedings of the jury, in the proceedings of the adverse party, and in the orders of the court, and by the abuse of the discretion of the court, by which the plaintiff [or defendant] was prevented from having a fair trial;

[Either or any of these grounds may be stated in the notice.]

Second. The misconduct of the jury;

Third. Accident and surprise, which ordinary prudence could not have guarded against;

[Either or both of these grounds may be stated.]

Fourth. Newly discovered evidence material for the plaintiff [or defendant] which he could not with reasonable diligence have discovered and produced at the trial;

Fifth. Excessive damages appearing to have been given under the influence of passion or prejudice;

Sixth. Insufficiency of the evidence to justify the verdict; [or the decision]

Seventh. That the verdict [or decision] is against law;

Eighth. Error in law occurring at the trial and excepted to by the plaintiff; [or defendant]

Said motion will be made [on affidavits and] a bill of excep-

tions, or a statement of the case, [or, [on affidavits and] upon the minutes of the court.]

G H,

Attorney for Plaintiff [*or Defendant.*]

To I J, Esq.,

Attorney for Defendant [*or Plaintiff.*]

This notice should be filed with the clerk and a copy served on the attorney of the adverse party.

Either or any of these grounds for a new trial may be inserted in the notice.

If the application is made for a cause mentioned in the first, second, third and fourth grounds stated in section 657 of the Code of Civil Procedure, it must be made on affidavits; for any other grounds mentioned in said section, it may be made either upon the minutes of the court, or a bill of exceptions, or a statement of the case. There is but little difference, except in name, between a bill of exceptions and a statement of the case, and general form No. 225 may be used as a general form for a statement of the case. And the form for proposed amendments to a bill of exceptions can be used as a general form for amendments to a statement of the case, and a statement of the case can be settled and allowed in the same manner that a bill of exceptions may be settled and allowed.

APPEALS.

An appeal, in California, may be taken by the aggrieved party to the Supreme Court after the entry of the final judgment in the trial court, either before or after the decision of that court on a motion for a new trial, also from an interlocutory judgment entered in an action to redeem property from a lien thereon determining the right to redeem, and directing an accounting; and from an interlocutory judgment entered in an action for the partition of real property, and which determines the rights and interests of the respective parties, and directs that a partition be made; and in other cases in which the statute has provided for such appeal in Code of Civil Procedure, section 939.

The appeal is taken by filing a notice of such appeal and serving a like notice upon the adverse party and giving an undertaking to perfect the appeal.

Several appeals may be included in the same notice, but a separate undertaking, except in the case of an appeal from a judgment, and from an order denying a motion for a new trial, (in which case, however, the undertaking must refer to the order as well as to the judgment), must be given, to render each appeal effectual, and if a stay of execution of the judgment or an order be desired, an undertaking must be given for that purpose in the cases provided for by statute.

FORM NO. 231.

NOTICE OF APPEAL.

[*Name of Court.*]

You will take notice that the plaintiff [or the defendant] in this action, appeals to the Supreme Court of the state of California, from the judgment of said Superior Court entered in said action on the — day of ——, and from the whole thereof; [or if a part only is appealed from, state such part.]

[And you will further take notice that the plaintiff [or the defendant] also appeals to the Supreme Court of the state of California from the order of said Superior Court made and entered in the action, on the — day of —— denying the plaintiff's [or defendant's] motion for a new trial of said action;]

[And you will further take notice that the plaintiff [or the defendant] appeals to the Supreme Court of the state of California, from the order of said Superior Court made and entered in the action on the — day of ——.] [State what the order was which is appealed from.]

[*Date.*]

G H,
Attorney for Plaintiff [*or Defendant.*]

To I J, Esq.,
Attorney for Defendant [*or Plaintiff.*]

There should be filed evidence of the service of notice of the appeal on the adverse party.

FORM NO. 232.

UNDERTAKING ON APPEAL TO THE SUPREME COURT TO RENDER SUCH APPEAL EFFECTUAL.

[*Name of Court.*]

WHEREAS the plaintiff [or defendant] has appealed to the Supreme Court of the state of California from the judgment [or order] of said Superior Court entered in the action on the — day of ——;

NOW, THEREFORE, to render such appeal effectual, we the undersigned, E F and G H, undertake and promise on the part of the appellant, ———, to the effect that the appellant will pay all damages and costs which may be awarded against him on said appeal, or on a dismissal thereof, not exceeding three hundred dollars.

[*Date.*]

E F.
G H.

[Affidavit of sureties as in Form 233.]

FORM NO. 233.

UNDERTAKING TO RENDER EACH OF SEVERAL APPEALS TO THE SUPREME COURT EFFECTUAL AND TO STAY THE EXECUTION OF A MONEY JUDGMENT OR ORDER PENDING THE APPEAL.

[*Name of Court.*]

WHEREAS the plaintiff [or defendant] has appealed to the Supreme Court of the state of California from the judgment [or order] of said Superior Court entered in the action on the — day of ——;

NOW, THEREFORE, to render such appeal effectual, we the undersigned, ——— and ———, undertake and promise on the part of the appellant, to the effect that the appellant will pay all damages and costs which may be awarded against him on said appeal from said judgment, [or order] or on a dismissal thereof, not exceeding three hundred dollars; and

WHEREAS, the plaintiff [or defendant] has appealed to the Supreme Court of the state of California from the order of

said Superior Court entered in the action on the — day of ——, denying the plaintiff's [or defendant's] motion for a new trial in the action;

NOW, THEREFORE, to render such appeal effectual, we the undersigned, ——— and ———, further undertake and promise on the part of the appellant to the effect that the appellant will pay all damages and costs which may be awarded against him on said appeal from said order, or on a dismissal thereof, not exceeding the further sum of three hundred dollars.

[And insert a like undertaking for each appeal contained in the notice of appeal.]

[And if the undertaking is to stay the execution of a judgment [or order] directing the payment of money, appealed from, insert as follows:]

And we, the undersigned, ——— and ———, further undertake and promise on the part of the appellant, and are bound to the respondent, in the sum of —— dollars, being double the amount named in the judgment [or order] appealed from, that if the judgment [or order] appealed from, or any part thereof be affirmed, or the appeal be dismissed, the appellant will pay the respondent the amount directed to be paid by the judgment [or order] or the part of such amount as to which the judgment [or order] is affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal, and that if the appellant does not make such payment within thirty days after the filing of the remittitur from the Supreme Court in the court from which the appeal is taken, judgment may be entered, on motion of the respondent, in his favor against us, for such amount, together with the interest that may be due thereon, and the damages and costs which may be awarded against the appellant upon the appeal.

[*Date.*] *Signatures.*

State of ———, county of ——— ss.

——— and ———, the sureties named in the foregoing undertaking, being duly sworn, each for himself says: That he is a resident and householder [or freeholder] within the state of California, and that he is worth the sum of —— dollars, over

and above all his debts and liabilities exclusive of property exempt from execution.

[The sum specified should be the aggregate amount of the sums for which the sureties are liable.]

[*Jurat.*] *Signatures.*

If the judgment or order appealed from, be for a sum exceeding two thousand dollars, the undertaking may be given by several sureties, provided the whole amount be equivalent to that of two sufficient sureties, and the affidavit of the qualification of the sureties should be changed accordingly.

When the judgment or order appealed from is made payable in a specific kind of money, the undertaking should be made payable in the same kind of money.

FORM NO. 234.

UNDERTAKING TO BE A SUPERSEDEAS IN CASE OF A JUDGMENT OR ORDER WHICH DIRECTS THE ASSIGNMENT OR DELIVERY OF DOCUMENTS, OR PERSONAL PROPERTY.

[*Name of Court.*]

WHEREAS, the judgment [or order] appealed from in this action directs the delivery [or assignment] of the following described documents [or personal property] namely: [State what] and the plaintiff [or defendant] has appealed to the Supreme Court of the state of California from said judgment [or order.]

NOW, THEREFORE, to stay the execution of said judgment [or order] during the pendency of said appeal, we, ———, principal, and ——— and ———, sureties, undertake and promise and are bound to the respondent in the sum of —— dollars, being the amount directed by said Superior Court [or by a judge of said Superior Court] to be given for the purpose of this undertaking, to the effect, that the appellant will obey the order of the appellate court upon the appeal.

[*Date.*] *Signatures.*

[Affidavit of qualification of sureties as in Form 233.]

FORM NO. 235.

UNDERTAKING ON APPEAL FROM A JUDGMENT OR ORDER APPOINTING A RECEIVER.

[*Name of Court.*]

WHEREAS, the judgment [or order] in this action appoints a receiver, and the defendant in the action has appealed from said judgment [or order] to the Supreme Court of the state of California;

NOW, THEREFORE, to stay the execution of said judgment [or order] pending said appeal, we, ———, said appellant as principal, and ——— and ——— as sureties, undertake and promise and are bound to said respondent in the sum of —— dollars, an amount fixed by the judge of the Superior Court for the purpose of this undertaking, to the effect that if such judgment [or order] be affirmed, or the appeal dismissed, the appellant will pay all damages which the respondent may sustain by reason of such stay, not exceeding said sum of —— dollars.

[*Date.*] *Signatures.*

[Affidavit of qualification of sureties as in Form 233.]

FORM NO. 236.

UNDERTAKING TO OPERATE AS A SUPERSEDEAS ON AN APPEAL FROM A JUDGMENT DIRECTING THE SALE OF PERSONAL PROPERTY ON FORECLOSURE OF A MORTGAGE THEREON.

[*Name of Court.*]

WHEREAS the judgment appealed from in this action directs the sale of the following personal property upon the foreclosure of a mortgage thereon, namely: [State the personal property directed to be sold.]

NOW, THEREFORE, for the purpose of staying the execution of such judgment pending the appeal, we, ———, the appellant, principal, and ——— and ———, sureties, undertake and promise and are bound to the respondent in the sum of —— dollars, an amount for which this undertaking is directed to

be given by said Superior Court [or by a judge of said Superior Court] to the effect that the appellant will on demand deliver said mortgaged property to the proper officer if the judgment be affirmed, or in default of such delivery, that said appellant and said sureties will on demand pay to the proper officer the full value of such property at the date of said appeal.

[*Date.*] *Signatures.*

[Affidavit of qualification of sureties as in Form 233.]

FORM NO. 237.

UNDERTAKING AS A SUPERSEDEAS IN ACTION FOR SALE, OR DELIVERY OF POSSESSION, OF REAL PROPERTY.

[*Name of Court.*]

WHEREAS the judgment [or order] appealed from in this action, has directed the delivery of the possession [or sale] of the following described real estate, namely: [Describe the real estate.]

NOW, THEREFORE, to stay the execution of said judgment during the pendency of such appeal, we, ——, the appellant, principal, and ——— and ———, sureties, undertake and promise and are bound to the respondent in the sum of —— dollars, the sum fixed for the purpose of this undertaking by the judge of said Superior Court by which the judgment was rendered [or order made] to the effect that during the possession of such real estate by the appellant he will not commit or suffer to be committed any waste thereon, and that if the judgment appealed from be affirmed or the appeal dismissed, he will pay the value of the use and occupation of said real estate from the time of the appeal until the delivery of possession thereof, pursuant to the said judgment [or order] [or, that he will pay any deficiency arising on the sale of said real property] not exceeding said sum of —— dollars.

[*Date.*] *Signatures.*

[Affidavit of qualification of sureties as in Form 233.]

If an undertaking be given to stay the execution of an order, the word order must be used in the undertaking in place of the word judgment.

In the cases mentioned in section 941 and 942, Code of Civil Procedure,

the undertaking to make the appeal effectual, and the undertaking to stay the execution of a money judgment or order, may be in one instrument; which is executed by the sureties, but the undertakings to make the appeal effectual and to stay the execution of the judgment or order in the cases mentioned in sections 943 and 945 of that code, should be in separate instruments, since the undertaking to make the appeal effectual, need not be executed by the appellant, and the undertakings mentioned in said sections—943 and 945—must be executed by the appellant and by the sureties.

If the judgment or order appealed from direct the execution of a conveyance or other instrument, the execution of the judgment or order cannot be stayed by the appeal until the instrument is executed and deposited with the clerk with whom the judgment or order is entered, to abide the judgment of the appellate court. Code of Civil Procedure, section 944.

FORMS UNDER APPLICATIONS FOR WRITS OF REVIEW, WRITS OF MANDATE AND WRITS OF PROHIBITION.

FORM NO. 238.

PETITION FOR WRIT OF REVIEW.

[*Name of Court.*]

A B, petitioner, v. The Justice's Court of —— Township, in the county of ——, and C D, the justice of said court, respondent.

A B, the petitioner herein, petitions this honorable court, and alleges and shows:

I. That on the — day of ——, your petitioner commenced an action in the justice's court of C D, a justice of the peace in —— township, in the county of ——, in the state of California, who was then, and ever since has been, such justice of the peace, against one E F, by filing a complaint in that action against said E F to recover judgment against him for one hundred and fifty dollars for services rendered for him at his request by your petitioner, and for costs of the action;

II. That said E F was at the commencement of the action, and ever since has been a resident of said township of —— in said county of ——; and after the filing of said complaint a summons was issued in the action and was served on said E F, the defendant therein, who afterwards answered in the action; and notice of the time of the trial was signed and issued by said justice of the peace, and was served on the parties to the action, and the action came on to be tried in said justice's court in said township on the — day of ——, the time designated in said notice, and your petitioner and said E F both personally appeared on said day for such trial and both waived a trial by jury, and said action was tried by said justice of the peace, and witnesses were sworn and examined, and evidence was introduced on such trial, and the cause was submitted to said justice's court for decision; and thereafter, and on the — day of ——, said justice's court rendered and entered judgment in the action in favor of your petitioner,

that he have and recover from the defendant E F one hundred and fifty dollars; and —— dollars, costs in that action.

III. That thereafter, and on the — day of ——, said justice's court, said C D, acting as the justice of said justice's court, on motion of said defendant E F, made and entered in his docket an order in said action purporting to vacate and set aside said judgment in said justice's court in favor of your petitioner, and to grant defendant a new trial in the action;

IV. That said justice's court had no jurisdiction to make said order and your petitioner has no appeal from said order, and has no plain, speedy and adequate remedy, other than by a writ of review, and your petitioner is the party beneficially interested in this proceeding.

WHEREFORE your petitioner makes application to this honorable court to grant your petitioner a writ of review, requiring C D, said justice of the peace, to certify fully to this honorable court at a specified time and place, a transcript of the record and proceedings in said justice's court in said action therein of your petitioner against said E F, to the end that said order be reviewed by this honorable court, and that such order be annulled, and be adjudged void and of no effect.

And your petitioner will ever pray, etc.

A B,
Petitioner.

G H,
Attorney for the Petitioner.
[*Duly verified.*]

If the writ of review be granted, the justice of the peace must certify fully to the court granting the writ, a transcript of the records and proceedings in the case mentioned in the writ and the matter will be heard on the transcript so returned, unless a further return be ordered.

FORM NO. 239.

PETITION FOR A WRIT OF MANDATE.

[*Name of Court.*]

A B, petitioner, v. C D, as sheriff of the county of ——, respondent.

A B, your petitioner, respectfully petitions this honorable court and shows:

I. That on the — day of —— this petitioner recovered judgment, which was duly given and made, in the justice's court of —— township, in —— county, in this state, held by ———, Esq., the justice of the peace of said justice's court, against one E F for the sum of —— dollars, and —— dollars costs of suit;

II. That said judgment has never been appealed from, vacated or set aside, and it is wholly unpaid and unsatisfied;

III. That on the — day of ——, an execution was issued out of said justice's court to enforce said judgment, and was directed and was delivered to said C D as sheriff of the said county of ——, in this state, and who then was, and ever since has been the sheriff of said county of ——;

IV. That E F, the defendant in that action, has no personal property in said county of —— which is not exempt from execution, but he has and owns real property in said county, namely, [describe said property] not exempt from execution, and which is sufficient to satisfy said judgment;

V. That this petitioner has pointed out said real estate to C D, said sheriff, and has requested him to levy on and sell under said execution said real estate or so much thereof as may be necessary for that purpose, to satisfy said judgment;

VI. That notwithstanding this request, said C D, as such sheriff, refused, and ever since has refused, as such sheriff, to levy on, under said execution, and to sell thereunder, said real estate, or any part thereof, or any interest of the said E F therein, for the purpose of satisfying said judgment, or any part thereof;

VII. That your petitioner is beneficially interested in having such writ of mandate issued by this honorable court, and he has no plain, speedy or adequate remedy in the ordinary course of law.

WHEREFORE your petitioner prays that a writ of mandate issue out of this honorable court directed to said C D as sheriff of said county of ——, in the state of California, commanding him to execute the writ of execution mentioned in this petition,

or show cause before this court, at a specified time and place, why he has not done so.

A B,
Petitioner.

G H,
Attorney for Petitioner.
[*Duly verified.*]

FORM NO. 240.

PETITION FOR A WRIT OF PROHIBITION.

[*Name of Court.*]

A B, petitioner, v. Hon. C D, judge of the Superior Court of the state of California, in the county of ——, respondent.

Your petitioner respectfully petitions this honorable court, and shows:

I. That an action is pending in the Superior Court of the state of California, in the county of ——, in which action your petitioner is plaintiff and one E F is defendant; and that Hon. C D is the judge of said Superior Court, and that G H is one of the attorneys for the defendant in that action;

II. That said G H, said attorney of the defendant in that action, is related to the Hon. C D, said judge of said court, by affinity in the third degree, computed according to the rules of law;

III. That the disqualification of the Hon. C D, judge of said Superior Court, to sit and act as judge on the trial of said action of your petitioner against said E F, has been brought to the attention of said C D, said judge, but notwithstanding this he has set said action for trial in said Superior Court to be tried before himself, presiding as judge, and he proposes to have the same tried before himself presiding as such judge;

IV. That your petitioner is beneficially interested in this proceeding, and has no plain, speedy or adequate remedy in the ordinary course of law.

WHEREFORE your petitioner prays that a writ of prohibition be issued out of this honorable court, directed to Hon. C D, judge of said Superior Court, commanding him to refrain from

sitting and acting as judge on the trial of said action now in the Superior Court of the state of California, in said county of ——, of your petitioner against said E F, until the further order of this court; and to show cause before this court, at a time and place to be specified in said writ, why he should not be absolutely restrained from sitting and acting as judge in the trial of said action.

A B,
Petitioner

G H,
Attorney for Petitioner.
[*Duly verified.*]

FORMS IN PROCEEDINGS FOR CONTESTING ELECTIONS, FORCIBLE ENTRY AND DETAINER, ENFORCING MECHANICS' LIENS, CONTEMPT OF COURT, AND FOR THE CONDEMNATION OF LAND FOR A PUBLIC USE.

FORM NO. 241.

CONTEST OF AN ELECTION.

[*Name of Court.*]

A B, contestant, v. C D, respondent.

A B, the contestant, contests the right of C D to the office of sheriff of the county of ——, in the state of California, and states the following facts showing the causes and grounds of this contest:

I. That this contestant was at the time of holding the election hereinafter mentioned, and had been continuously for more than —— months next before that time, and ever since has been, a citizen of the United States and an elector in said county of —— in this state;

II. That on the — day of —— a general election was held in said county of ——— for the purpose of electing, besides other officers, the sheriff of said county of ———, to hold office as such sheriff for the legal term of such office, commencing at twelve o'clock meridian on the first Monday after the first day of January next succeeding such election;

III. That this contestant was, at said election, a candidate for election for said office of sheriff for said term, and his name was on the ballots to be voted at said election, as a candidate for said office, and said C D, said respondent, was also a candidate for election for the same office for the same term;

IV. That on the — day of ——, the board of supervisors of said county of ———, acting as a board of canvassers, declared said C D elected to said office of sheriff for the term aforesaid;

V. That there was malconduct on the part of the board of judges of each election precinct in said county in that the board of judges in each election precinct in said county called out and had counted for said respondent for said office as legal

votes for said office, legal votes which were in fact cast for the contestant for said office; and they called off and had counted for the respondent C D for said office a large number of votes as legal votes cast for him, which were not in fact cast at said election for him, and neglected to call off and have counted for this contestant for said office, a large number of legal votes which were in fact cast at said election for this contestant for said office. [State all other acts of malconduct of each of said boards of election of each of said precincts to the injury of the contestant.]

That said board of election of each of said precincts returned the votes so counted to the board of supervisors of said —— county, as a board of canvassers, and said board of supervisors, as such board of canvassers, canvassed and counted the votes of each of said election precincts as so returned, and the votes of said precincts so canvassed and counted changed the result of the election in said county, in that said vote of said precincts so returned and canvassed showed with other votes of the county that said C D had received more votes for said office of sheriff than did this contestant, and if the vote of said precincts had not been so counted, returned and canvassed, the legal votes cast for this contestant for said office of sheriff in said county at said election would be shown to have exceeded the legal votes cast for C D for said office;

VI. That in [state the precincts] ——— illegal votes were at said election given, and were received and they were counted and canvassed as legal votes for the respondent C D for said office of sheriff, which, if taken from him, will reduce the number of legal votes given for him for said office of sheriff, below the number of legal votes given at said election for this contestant for the same office;

VII. That in each precinct in said ——— county, each of many voters at said election placed a mark upon his ballot which he voted, by which mark such ballot could afterwards be identified as voted by the person who voted the same; and the voters who voted such ballots voted for the respondent C D for said office of sheriff, and the ballots so marked and voted were counted and canvassed as legal votes for the respondent

C D for said office of sheriff, and the illegal ballots, so cast, counted and canvassed as legal votes for him for said office, and said other illegal votes which were counted and canvassed for him, if taken from him, would reduce the number of legal votes given for him at said election for said office of sheriff, below the number of legal votes given at said election for this contestant for the same office.

WHEREFORE this contestant prays that this honorable court order a special session of this court to be held, to hear and determine said contested election.

A B,
Contestant.

G H,
Attorney for Contestant.
[*Duly verified.*]

Code of Civil Procedure, Section 1115.

Three days before the trial of the contest, the contestant must deliver to the respondent a written list of the illegal votes given for respondent, and by whom given.

The respondent may demur to said statement of facts for insufficiency, and he may controvert the statement by an answer thereto.

FORM NO. 242.

COMPLAINT FOR A FORCIBLE ENTRY UPON REAL ESTATE, AND A DETAINER THEREOF.

[*Name of Court.*]

A B, plaintiff, v. C D, defendant.

A B, the plaintiff in this proceeding, complains and alleges:

That on the — day of —— he was in the actual, peaceable and exclusive possession of real property situate in the county of ———, in the state of California, described as: [Describe the real property.]

And on said — day of ——, and while plaintiff was so in the actual, peaceable and exclusive possession of said real property, the defendant with force and arms, violence and menaces, unlawfully and forcibly entered on said described premises, and with force and violence put out and expelled plaintiff therefrom, and from the possession thereof, and he has ever since unlawfully detained and withheld the possession

of said premises from plaintiff to plaintiff's damage, ——— dollars.

WHEREFORE plaintiff demands judgment against defendant that plaintiff be restored to the possession of said real property, and for ——— dollars damages, and that said damages be trebled; and for plaintiff's costs in this proceeding.

G H,
Attorney for Plaintiff.

[*Duly verified.*]

FORM NO. 243.

COMPLAINT FOR A PEACEABLE ENTRY ON, AND TURNING OUT BY FORCE THE PLAINTIFF FROM THE POSSESSION OF REAL PROPERTY.

[*Title of Proceeding.*]

A B, the plaintiff in this proceeding, complains and alleges:

I. That on the — day of —— plaintiff was in the peaceable, actual and exclusive possession of real property situate in said county of ——, and described as [describe the real property] and has ever since had the right to have the peaceable, actual and exclusive possession thereof;

II. That on said — day of ——, and while plaintiff was so in the peaceable, actual and exclusive possession of said real property, the defendant entered peaceably upon said real property, and after such entry thereon he unlawfully and with force and violence, threats, and menacing conduct, turned out and expelled plaintiff from the possession of said real property, and he has ever since unlawfully detained and withheld the possession of said premises from plaintiff, to plaintiff's damage, ——— dollars.

WHEREFORE plaintiff demands judgment against defendant that plaintiff be restored to the possession of said real property, and for ——— dollars, damages, and that such damages be trebled; and for plaintiff's costs in this proceeding.

G H,
Attorney for Plaintiff.

[*Duly verified.*]

FORM NO. 244.

COMPLAINT IN AN ACTION FOR THE FORCIBLE DETAINER OF REAL PROPERTY WHEN THE ENTRY ON THE REAL PROPERTY WAS IN THE NIGHT TIME, OR WHEN THE OCCUPANT WAS ABSENT THEREFROM.

[*Title of Proceeding.*]

A B, plaintiff in this proceeding, complains and alleges:

I. That plaintiff was on the — day of ——, and had been continuously for more than five days next prior thereto, in the peaceable, actual, exclusive and undisturbed possession and occupancy of real property situated in said county of ———, described as [describe the real property.]

II. That on said — day of ——, and while plaintiff was so in the peaceable, actual, exclusive and undisturbed possession and occupancy of said real property, the defendant C D in the night time, [or during the absence of the plaintiff from such property] unlawfully entered upon said real property and took possession of the same;

III. That on the — day of —— plaintiff made a demand in writing on said defendant that he surrender to the plaintiff the possession of said real property;

IV. That more than five days have elapsed since such demand was made, and the defendant refused, notwithstanding such demand, to surrender to plaintiff the possession of said real property, and has unlawfully withheld from plaintiff ever since defendant's said entry thereon, the possession of said real property, to plaintiff's damage, ——— dollars.

[Demand for judgment as in Form 243.]

G H,
Attorney for Plaintiff.

[*Duly verified.*]

FORM NO. 245.

COMPLAINT AGAINST A TENANT FOR AN UNLAWFUL DETAINER.

[*Title of Proceeding.*]

A B, plaintiff in this proceeding, complains and alleges:

I. That on the — day of —— the plaintiff leased to the defendant C D, and delivered to him under said lease the possession of real property situated in said county of ———, described as [describe the property leased] for the term of ———, commencing on the — day of ——, for the monthly rent of ——— dollars, the first month's rent to be paid by defendant to plaintiff on the — day of ——, and a month's rent of ——— dollars to be paid by defendant to plaintiff on the — day of —— each and every month thereafter;

II. That the defendant accepted from plaintiff said lease of said real property for said term, and received possession thereof from plaintiff under said lease, and promised and agreed to pay plaintiff the monthly rent of ——— dollars therefor each month during said term; and promised and agreed to pay to plaintiff the first month's rent of ——— dollars therefor on the — day of ——; and promised and agreed to pay to plaintiff a monthly rent therefor of ——— dollars on the — day of each and every month thereafter;

III. That the defendant has occupied said leased property under said lease ever since the — day of ——, and now occupies the same under said lease, and he has paid all the rent due by the terms of said lease, with the exception of the month's rent of ——— dollars therefor, which was to be paid on the — day of ——; but he has not paid said month's rent, nor any part thereof, and the same is due and wholly unpaid;

IV. That on the — day of —— plaintiff served on the defendant C D notice in writing requiring the payment by him to plaintiff within three days thereafter, of said sum of ——— dollars, said unpaid month's rent, or the possession of said leased real property; and more than three days have elapsed since the service on said defendant of said notice, and said defendant has not paid said rent, and the same is wholly unpaid;

and he has not delivered to plaintiff the possession of said leased property, but he continues in possession of the same without the permission of plaintiff.

WHEREFORE plaintiff demands judgment against the defendant that said lease be declared forfeited; that plaintiff have restitution of the possession of said leased property; and that plaintiff have judgment for the said sum of ——— dollars; and that the same be trebled; and for plaintiff's costs in this action.

G H,
Attorney for Plaintiff.

[*Duly verified.*]

FORM NO. 246.

COMPLAINT TO ENFORCE A LIEN OF MECHANICS AND OTHERS.

[*Name of Court.*]

A B, plaintiff, v. C D, E F, K L and M N, defendants.

A B, the plaintiff in this proceeding, complains and alleges:

I. That the defendant C D was on the — day of ——, and ever since has been the owner of the [describe the real property] and on the said — day of ——, and while so such owner, he contracted in writing with the defendant E F for the erection of a building thereon, which was to be —— feet in length, and —— feet wide, and —— stories high, [with an annex thereto which was to be —— feet in length, and —— feet wide, and one story high] for the sum of ——— dollars to be paid in installments to said defendant E F therefor; and in and by such contract, and for said price, said defendant was to furnish all the materials and labor necessary for the erection of said building.

Said written contract was subscribed by the parties thereto and it contained the names of said C D and E F, a description of the land on which such building was to be erected, and a statement of the general character of the work to be done, and the total amount to be paid thereunder; and contained a stipulation that said contract price was not to be paid, and that

no part thereof was to be paid before the work of erecting said building was commenced; and contained a stipulation that such contract price should be paid after the commencement of the work in installments on the completion of specified portions of the work, and that at least twenty-five per cent. of said contract price for the whole work should not be paid until thirty-five days after the final completion of the contract;

II. That said contract, after it was subscribed by the parties thereto, and before any work was done thereunder, was filed by them in the office of the county recorder of the county of ———, in this state, the county in which said lot on which said building was to be erected is situate; and said contract was accompanied by a good and sufficient bond made by said E F and sufficient sureties in an amount equal to at least twenty-five per cent. of said whole contract price; and which bond was filed in the office of said county recorder at the time said contract was filed, and was by its terms to inure to the benefit of any and all persons who performed labor for, or furnished materials to, said E F, said contractor, or to any person acting for said contractor, or by his authority;

III. That plaintiff sold to said contractor, E F, about ——— feet of lumber of different kinds for the agreed price of ——— dollars, and which lumber was of the reasonable value of ——— dollars, and which sum was to be paid therefor at or before the completion of said building; said lumber was sold to be used in the erection of said building, and said lumber was furnished by the plaintiff, under such sale thereof to the defendant E F to be used in, and it was used in and for the erection of said building, [and after said sale of said lumber, and on the — day of ——, plaintiff gave personally to the defendant C D, who was the owner of said lot on which said building was contracted to be built, notice that plaintiff had agreed with the defendant E F, said contractor, to furnish said lumber, which consisted of joist, studding, [state generally what the lumber was] of the value of, and for the agreed price of ——— dollars, to be used in the erection of such building; and that the amount of said lumber already furnished E F, said contractor, for the erection of said building, and which had

been used in, and was being used in the erection of said building, was of the value of ——— dollars; and that the value of the whole of said lumber so agreed to be furnished for the erection of said building was ——— dollars; and that said contractor, E F, had paid plaintiff on account of the lumber so furnished the sum of ——— dollars, and no more;

[That the defendant C D, the owner of said lot, had at the time said notice was served on him, paid to the defendant E F, said contractor, no more than ——— dollars for the erection and completion of said building so agreed to be constructed, erected and completed.]

IV. That said building was fully constructed, erected and completed on the — day of ——, and the whole of said [describe the real property on which the building was erected] is required for the convenient use and occupation of said building;

V. That there is due and unpaid to plaintiff for the said lumber so sold and furnished by plaintiff to said contractor for the erection and completion of said building, and which was used for the erection and completion thereof, the sum of ——— dollars; and that within thirty days after such completion plaintiff filed and had recorded in the office of the county recorder of the said county of ———, plaintiff's claim of lien upon said building, and upon said real property on which it is situate, to secure the payment of said sum of ——— dollars unpaid to plaintiff as aforesaid, and which claim of lien contained a statement of plaintiff's demand as aforesaid, after deducting all just credits and offsets, a description of the said real property on which said building was erected, and which was charged with said lien, the name of said defendant C D, the owner thereof, the name of said defendant E F, said contractor, and that plaintiff had furnished to said contractor, E F, said lumber for the erection of said building, and it was used for such erection, and plaintiff described such lumber in said claim of lien; and such claim of lien contained the terms, the time given, and the conditions of said contract for the sale of, and the furnishing of such lumber; and which claim of lien was verified by the oath of this plaintiff;

VI. That this proceeding was commenced within ninety

days after the filing of said claim of lien, and the expenses of filing said claim of lien was ——— dollars, which were paid by plaintiff; and plaintiff has employed an attorney in this proceeding and for preparing said claim of lien, and the reasonable value of his services therefor, and in this proceeding is and will be ——— dollars;

VII. [That the defendant K L claims to have a lien by mortgage on the real property on which said building was erected and is situate, but such lien did not attach to said real property until said lumber was commenced to be furnished under said contract for the erection of said building; and said defendant M N claims to have a lien on said real property, but plaintiff had no knowledge or notice thereof, and the same was unrecorded at the time plaintiff commenced to furnish said lumber, under said contract with said contractor, to be used for the erection and completion of said building.]

WHEREFORE plaintiff prays judgment that he have and recover from the defendant E F [or the defendants C D and E F] the sum of ——— dollars, the unpaid portion of the money on said contract for furnishing said lumber, with interest thereon from the — day of ——; and the sum of ——— dollars, money expended by him for recording said claim of lien; the further sum of one hundred dollars, the reasonable fee of his attorneys; and plaintiff's costs of this proceeding; and that all of said sums of money be adjudged to be a charge and lien upon said building and the said real property on which it is situated; and that said mortgage of said defendant K L and said lien of the defendant M N, are subject to said lien of plaintiff;

That said real property be sold by the sheriff of this county, and out of the moneys realized from such sale the sheriff pay the costs and expenses of such sale, and pay the residue of such money, or so much thereof as may be necessary to pay and satisfy said charge and lien on said building and land, to the plaintiff or his attorney;

And that if the proceeds from the sale of said real property and building be insufficient to pay to plaintiff said sum of money adjudged to be paid to him, and there is a deficiency in such proceeds to pay the same, a judgment be docketed in

favor of plaintiff and against the defendant E F [and C D] for such deficiency, to be a lien on the real property of the defendant E F [and the real property of the defendant C D] and that plaintiff have execution to enforce said deficiency judgment.

G H,
Attorney for Plaintiff.

[*Duly verified.*]

If the court finds for the plaintiff in the proceeding, after such finding, and the order for judgment therein the judgment may be in the following form:

FORM NO. 247.

JUDGMENT IN AN ACTION FORECLOSING A LIEN UNDER THE MECHANICS' LIEN LAW.

[*Title of Proceeding*]— JUDGMENT.

The summons in this proceeding having been duly issued, and having been duly served on each and all the defendants in the proceeding, and the default of the defendants, ———, in this proceeding for failure to appear and answer having been duly entered, and this cause coming on regularly to be tried by the court on the — day of ——, G H, Esq., appearing as attorney for plaintiff, and I J, Esq., appearing as attorney for the defendant E F [and P Q, Esq., appearing as attorney for the defendants ———] and witnesses having been sworn and examined, and documentary evidence having been introduced, and the cause having been argued by counsel for the respective parties, and submitted to the court for its decision, and the court having filed its findings of fact and conclusions of law therefrom, and ordered judgment accordingly;

NOW THEREFORE IT IS ADJUDGED AND DECREED that A B, the plaintiff in this proceeding have and recover from ———, the defendant E F [or the defendants C D and E F] herein the sum of ——— dollars, and plaintiff's costs in this proceeding, taxed at ——— dollars; and that said sums of money are a charge and lien upon the [describe the real property] and the building thereon; that said real property and the building thereon be sold by the sheriff of this county in the manner prescribed by law, and that out of the proceeds of such sale said

sheriff pay the costs and expenses of sale; and that out of the residue of such proceeds he pay to the plaintiff or to his attorney, said sum of —— dollars, and the interest thereon from the date of this judgment, and plaintiff's costs of this proceeding, or so much of said sums and interest as the same will pay; and that he pay over the residue of said proceeds, if any remain, to the defendant C D, and that after the time given by statute for the redemption of the property sold from such sale has expired, and the same is not redeemed from the sale, that he make to the purchaser on such sale, or his assignee, if any, a sheriff's deed of the property sold; and that if there be a deficiency in the proceeds of said sale to satisfy said lien of plaintiff, on which this action is brought, that judgment for such deficiency be docketed against the defendant E F, [or the defendants E F and C D] and that such deficiency judgment so docketed be a lien on the real property of the defendant E F, [and on the real property of the defendant C D] and that plaintiff have execution to enforce such deficiency judgment; and that the mortgage of the defendant K L, and the lien of the defendant M N on said premises, and which mortgage and lien are mentioned in the complaint, are subject to the lien of plaintiff on which this proceeding is brought.

[*Date.*]

——————,

Judge.

FORM NO. 248.

RECITALS AND JUDGMENT FOR A CONTEMPT OF COURT COMMITTED IN THE PRESENCE OF THE COURT.

[*Name of Court.*]

In the matter of proceedings for contempt of court against I J.

WHEREAS, during the trial of an action in this court of A B, plaintiff, against C D, defendant, before a jury, I J, Esq., was attorney for the defendant, and G H, Esq., was attorney for the plaintiff, and during the progress of the trial of said action the said I J, who was the attorney for said defendant, on the — day of ——, in the presence of the court, and in the presence

of the jury before whom said action was being tried, struck said G H, who was the attorney for plaintiff, a violent blow with his fist, and which tended to and did interrupt the due course of said trial; and the court finds that said I J, Esq., is thereby guilty of a contempt of this court; and it is adjudged that he be punished for such contempt by a fine of —— dollars.

Done in open court this — day of ——.

_____,
Judge.

FORM NO. 249.

JUDGMENT IN A PROCEEDING FOR A CONTEMPT OF COURT AGAINST A WITNESS FOR REFUSING TO ANSWER A RELEVANT AND MATERIAL QUESTION.

[*Name of Court.*]

In the matter of proceedings against K L for a contempt of court.

WHEREAS, an action wherein A B is plaintiff and C D is defendant was regularly on for trial in this court at the court room thereof on the — day of ——, and

WHEREAS, on such trial and at said time K L was duly sworn as a witness and was being examined as a witness, and

WHEREAS, the attorney for the plaintiff in the action asked said K L as such witness in the action this question, [state the question] and

WHEREAS, such question was and is material and relevant under the issues in the action; and

WHEREAS, K L, said witness, declined to answer said question, and he was thereupon ordered by the court to answer the same; and

WHEREAS, said K L thereupon refused and still refuses to answer said question, the court finds that said K L is thereby guilty of a contempt of this court, and it is adjudged that he be punished for such contempt by imprisonment in the county jail of the county of ———, in this state, until he consents to answer such question.

Done in open court this — day of ——.

_____,
Judge.

FORM NO. 250.

AFFIDAVIT FOR PROCEEDINGS FOR PUNISHING A CONTEMPT OF COURT.

[*Title of Court and Proceedings Similar to That in Form 249.*]

[*Venue.*]

A B, being duly sworn, says: That on the — day of —— a judgment of a perpetual injunction was rendered and entered against C D in an action in the Superior Court of the state of California, in the county of ———, in which this affiant, A B is plaintiff, and the said C D is defendant; which injunction among other things enjoined said C D, the defendant in that action, from [state the acts which said injunction enjoined said C D from doing] that a copy of said judgment of injunction, certified to by the clerk of said court, was served on said C D at the county of ———, in the state of California, on the — day of ——, and he then had, and ever since has had knowledge and notice of said injunction; that said judgment has not been appealed from, reversed or set aside, and is in full force;

That after the service of said copy, and on the — day of ——, said C D did, [state the acts which said C D did] in disobedience to the commands of said injunction, and therefore this affiant charges said C D with a contempt of this court.

[*Jurat.*] A B.

FORM NO. 251.

ORDER TO SHOW CAUSE, MADE ON THE FILING OF SAID AFFIDAVIT.

[*Title of Proceeding.*]

Upon reading and filing the affidavit of A B, showing that C D has disobeyed the commands of a judgment of injunction rendered and entered in the Superior Court of the state of California, in an action therein in which said A B is plaintiff and said C D is defendant;

IT IS ORDERED that said defendant in that action, C D, show cause before said court at the court room thereof on the — day of —— at — a.m., why he should not be punished for a con-

tempt of said court for such disobedience, and that this order be served on said C D by delivering to him personally a certified copy thereof with a copy of said affidavit of A B thereto attached at least — days before said — day of ——.

[*Date.*] ——————,

Judge.

Or, the court may order on such affidavit that a warrant of attachment be issued.

FORM NO. 252.

WARRANT OF ATTACHMENT TO BE ISSUED IN PROCEEDINGS TO PUNISH FOR A CONTEMPT OF COURT.

[*Title of Proceeding.*]

It appearing from the affidavit of A B, filed on the — day of ——, that C D has disobeyed the commands of the injunction in the judgment rendered and entered on the — day of ——, in an action in said Superior Court of the state of California, in the county of ———, in which said A B is plaintiff and said C D is defendant, and that said C D was served personally with a copy of said judgment and injunction on the — day of ——, and that said C D, after he was so served with said copy, and knew of said judgment and injunction, wilfully disobeyed the commands of said injunction and is thereby guilty of a contempt of the court;

NOW, THEREFORE, IT IS ORDERED that a warrant of attachment be issued to bring said C D before this court on the — day of —— at — o'clock — m. to answer the charge of contempt contained in said affidavit, and that a copy of said affidavit be served on said C D at the time he is arrested under such warrant of attachment.

[*Date.*] ——————,

Judge.

When such warrant of attachment is issued the court or judge must direct by an endorsement on such warrant that the person charged with such contempt be let to bail in an amount specified in such indorsement, to answer the charge of contempt of court embraced in said affidavit.

FORM NO. 253.

RECITALS AND JUDGMENT FOR A CONTEMPT OF COURT WHEN THE CONTEMPT WAS NOT COMMITTED IN THE PRESENCE OF THE COURT.

[*Name of Court.*]

In the matter of proceedings against C D for a contempt of court.

WHEREAS, an affidavit has been filed in this court charging C D with a contempt of court, and a warrant of attachment has been issued to bring said C D before this court to answer said charge, [or an order has been granted and served on said C D to show cause why he should not be punished for the contempt so charged in said affidavit] and the said C D having appeared before the court on the — day of ——, and answered said charge, and the court having investigated said charge and having heard the answer of said C D thereto, and having heard evidence in respect to said charge, the court determines and finds on said investigation, answer and evidence, that by an injunction contained in a judgment rendered and entered in an action in this court, wherein A B is plaintiff and said C D is defendant, on the — day of ——, said C D was enjoined from [state the acts which said C D was enjoined from doing] that a certified copy of said judgment and injunction was served on said C D on the — day of ——; and that after such service said C D did wilfully; [state the acts he did.]

And the court finds and adjudges that C D, by said acts so done by him, is guilty of a contempt of this court;

And it is adjudged and decreed that said C D be punished for such contempt of this court by a fine of —— dollars; and that he be imprisoned for — days in the county jail of —— county in this state; that an execution be issued to enforce the payment of said fine, and that a warrant of commitment be issued out of this court for the enforcement of the judgment of imprisonment.

Done in open court this — day of ——.

——————,

Judge.

FORM NO. 254.

COMPLAINT FOR THE CONDEMNATION OF LAND FOR A PUBLIC HIGHWAY.

[*Name of Court.*]

The county of ———, in the state of California, plaintiff, v. A B, defendant.

Plaintiff complains and alleges:

I. That the name of plaintiff is the county of ———, in the state of California;

II. That the name of the owner and claimant of the property sought to be condemned in this proceeding is A B, and he is styled defendant in this proceeding;

III. That on the — day of —— the board of supervisors of said county of ———, by its order which was duly given and made, directed proceedings to be instituted by the district attorney of said county to procure the right of way for a new public highway in said county, against all non-accepting land owners who had not given their consent in writing to give the right of way for said proposed new public road, and against each of them who had not consented to accept the amount of damages which had been awarded to him by said board for the opening of said proposed new public road, under and as provided in title seven, part three, of the Code of Civil Procedure;

IV. That the only landowner of land over which said proposed new public road passes, and who has not either given his consent in writing to give the right of way for said proposed new road, or has not consented to accept the amount of damages which has been awarded to him by said board for the opening of said proposed new public road, is the defendant A B;

V. That said proposed new public road is of the width of — feet for its entire length, and the general route of the same is: [describe it] and the termini thereof are, [state the termini] and this complaint is accompanied by a map of said proposed new road, marked "Exhibit A," attached to this complaint, and it is referred to and made a part hereof;

VI. That a description of the land owned by the defendant sought to be condemned through these proceedings for a right of way for said proposed new public road is; [describe it] and

the same is only a part of an entire tract of land, and said entire tract of land is; [describe it]

WHEREFORE plaintiff demands that said [describe the land sought to be condemned] be condemned for a right of way for said proposed public road; and that the damages of the defendant be assessed for the taking of the same for such proposed new public road.

_____,

District Attorney of said County of ———, *and Attorney for Plaintiff.*

[Duly verified by the chairman of the board of supervisors of the county.]

A map of the proposed new public road should be attached to the complaint as an exhibit.

FORMS USED IN PROBATE PROCEEDINGS.

The following forms are for use in California and in states, the statutes of which are similar to those of California, as to probate matters.

FORM NO. 255.

FORM OF A PETITION THAT A WILL BE ADMITTED TO PROBATE AND FOR LETTERS TESTAMENTARY THEREON.

In the Superior Court of the state of California, in the county of ———.

In the Matter of the Estate of C D, deceased.

Your petitioner, A B, alleges and shows:

I. That C D died in the county of ———, in the state of ———, on or about the — day of ——, and he left a will which is his last will, and said will was filed in this court on the — day of ——;

II. That said C D was at the time of his death a resident of the county of ———, in the state of California; [or,

II. Said C D died in the county of ———, in the state of California, and left estate in said county, and he was not a resident of the state of California at the time of his death]; [or,

II. Said C D died out of the state of California, and was not a resident of that state at the time of his death, and he left estate, which was a part of his estate at the time of his death in the county of ———, in the state of California]; [or,

II. Said C D died in the county of ———, in the state of California, and he did not leave any estate in that county, and he was a non-resident of the state of California at the time of his death, and a part of his estate is in the county of ———, in the state of California]; [or,

II. The Superior Court in no county of the state of California has acquired jurisdiction to prove said will, and grant letters testamentary thereon under either of the first four subdivisions of section 1294 of the Code of Civil Procedure, and application for such purpose is first made in the county of ———, in the state of California;]

III. That your petitioner is, [or your petitioner and E F are] named as executor [or executors] in said will, and he consents [or they consent] to act as such executor; [or executors]

IV. That the names, ages and residences of the persons who are the heirs and devisees and legatees of said decedent so far as they are known to your petitioner, are; [state the name, age and residence of each heir and of each devisee and legatee of the decedent as accurately as it can be reasonably done]

V. The probable value and character of the estate of the deceased are; [describe the character and probable value of the property of the estate of the decedent]

That the names of the persons for whom letters testamentary are prayed, are [state the names.]

A B,
Petitioner.

G H,
Attorney for Petitioner.

FORM NO. 256.

NOTICE OF SETTING PETITION FOR HEARING.

[*Title of Proceeding.*]

A B having produced and filed an instrument in writing purporting to be the will of C D, deceased, and having filed his petition for the probate of said instrument in writing as the will of said C D, deceased, and the granting of letters testamentary to him thereon, the clerk of said court sets said petition for hearing by the court on the — day of —— at — o'clock — m.

[*Date.*]

J J, *Clerk.*
By K L, *Deputy*...

FORM NO. 257.

NOTICE OF HEARING BY THE COURT OF SAID PETITION.

[*Title of Proceeding.*]

A B having produced and filed in said court an instrument in writing purporting to be the will of C D, deceased, and having filed his petition for the probate of the same as the will of C D,

deceased, and granting letters testamentary to him thereon, notice is hereby given that the clerk of the court has set the — day of —— at — o'clock — m. for hearing said petition by the court, when all persons interested in the estate of C D, deceased, may appear and they will be heard.

[*Date.*] J J, *Clerk.*
By K L, *Deputy.*

Sections 1303 and 1304 Code of Civil Procedure prescribe how this notice shall be published and served.

FORM NO. 258.

CONTEST OF THE WILL PROPOSED FOR PROBATE.

[*Title of Proceeding.*]

E F opposes and contests the probate of the proposed will of C D, deceased, filed in this court on the — day of ——, and proposed for probate, and he files written grounds of objections to the probate thereof, and alleges the following facts showing his right to contest such probate, and the grounds of such opposition:

I. He alleges that he is a son of C D, said decedent, and is one of his heirs;

II. And for a ground of contest contestant alleges that said proposed will was not subscribed by said decedent himself, nor was his name thereto subscribed by any person in the presence of said decedent and by his direction; and he further alleges that if said proposed will was so subscribed, the subscription of the decedent's name thereto was not made in the presence of the attesting witnesses thereto, nor was it acknowledged by said decedent to said attesting witnesses to have been made by the decedent, or by his authority; and said decedent did not declare to the attesting witnesses that said instrument in writing which is proposed as a will in this proceeding was his will, and that neither of said attesting witnesses to said proposed will signed his name at the end of said proposed will at the request of said decedent, or in his presence;

III. And for a further ground of contest he alleges that

said C D was incompetent to make a last will and testament at the time said proposed last will was subscribed by him, if it was subscribed by him;

That said C D was, at the time of the signing of said proposed will eighty years old, and he had been for some time sick, and his mind and memory were then much impaired, and his mind was weak, debilitated and deranged to such an extent as to incapacitate him from making a will;

IV. And for a further ground of contest, contestant alleges that said proposed will of said decedent, if executed by decedent, was procured to be so executed, by and through the fraud of one K L; that said C D was at the time of the subscription of his name to said proposed will of the age of — years and upwards; that he had been for about two weeks next previous to the subscription of his name to said proposed will, sick, and his mind was so enfeebled by age and by such sickness that he could be easily imposed upon and deceived; that while his mind was so enfeebled, said K L, who was then an intimate acquaintance of said C D, falsely and fraudulently stated in substance to said C D, and for the purpose of inducing said C D to make his will, and to omit therefrom any devise or bequest to this contestant, and to declare therein such omission to be intentional; that this contestant had become very dissipated, and was leading a wild and dissipated life, and would, in case this contestant should receive any of the estate left by the decedent on his death, spend the same in riotous living, and that this contestant was an undutiful son, and had stated to said K L that this contestant would be glad when the said C D was dead so that contestant could receive a portion of the property of said C D, and enjoy the pleasure which the use thereof would give contestant; and said K L stated to said C D that he should make his will and omit therefrom any devise or bequest to this contestant, and to declare in such will that he did so intentionally; and C D, believing such false and fraudulent statement of the said K L to be true, and induced so to do thereby, executed the will, which is the will proposed for probate in this proceeding;

That this contestant was always a dutiful and affectionate son to said C D; that about two years before the death of said C D, this contestant left for the purposes of business, the part

of the country where his father, said C D, resided, and this contestant engaged in business at ———, and contestant never heard of said sickness of C D, his father, until after his father's death; and this contestant never was wild or dissipated, and never led a wild or dissipated life, and never stated to said K L, or to any one, that this contestant would be glad when his said father, said C D, was dead, so that contestant could receive a portion of the property of his said father and enjoy the pleasure which the use thereof would give contestant, nor anything of that kind, or purport, and never made any part of such statement to said K L nor to any one;

That C D, always before such false and fraudulent statements were made to him was a kind and affectionate father to this contestant, and had frequently told this contestant that he, C D, would never make a will, and that his children should inherit his property as the law provided; and that wholly induced by said fraud, and said false and fraudulent representations of said K L, said C D, this contestant's father, executed said proposed will; and he would not have executed the same if he had not been induced by such fraud and false and fraudulent representations so to do;

V. And for a further ground of contest contestant alleges that said proposed will of said decedent, if executed by the decedent, was procured to be executed by and through the undue influence of one K L over C D, said decedent; that said C D was at the time of the making of said proposed will of the age of eighty years and upward; that he had been sick for about two weeks next before the making of said proposed will, and his mind was so much enfeebled by his age and by such sickness that he could be easily influenced by others; and that said K L had great influence over said C D, and taking advantage of such influence, and of said feebleness of mind of said C D, said K L did, at and during the time the mind of said C D was so enfeebled by his age and by such sickness, persuade and induce said C D to make [or cause to be made] a subscription of his name to said proposed will, and to declare the same to be his will, and to cause the same to be attested as his will, which said C D would not have done unless he had been so influenced by said K L.

WHEREFORE contestant prays that said proposed will be not admitted to probate, and for this contestant's costs in this contest.

I J,
Attorney for Contestant.

FORM NO. 259.

JUDGMENT OF THE COURT ADMITTING WILL TO PROBATE AND GRANTING LETTERS TESTAMENTARY.

[*Title of Proceeding.*]

A B having petitioned the court to admit to probate as the will of C D, deceased, a written instrument filed in the court on the — day of ——, and to grant and have issued to him letters testamentary thereon; (1) and said petition coming on regularly to be heard on the — day of ——, G H, Esq., appearing as attorney for the petitioner, and proof having been made that notice had been given of such hearing as required by law, and no contest having been made, and the court having heard testimony in proof of the allegations in said petition contained, and the court finds therefrom that said proposed will was duly executed, and that said C D was, at the time of its execution, of sound and disposing mind, and was not acting under menace, fraud, duress, or undue influence, and that said C D was at the time of the execution of said will over eighteen years of age, namely, of the age of — years, and that said C D died on or about the — day of ——, and that he was a resident of said county of ——— at the time of his death; or (2) [and E F having filed an opposition and contest to the probate of said proposed will, and certain questions of fact having arisen on such contest, and were regularly tried by a jury, and the jury having rendered their verdict in favor of the proponent of said will; and it having been proven that notice had been given of the hearing of the petition as required by law, and that said proposed will was duly executed, and that said C D was at the time of its execution of sound and disposing mind, and was not acting under menace, fraud, duress or undue influence, and that he was at the time of the execution of said will over the age of eighteen years,

namely, of the age of — years; and that he died on the — day of ——, and that he was a resident of said county of ——— at the time of his death;]

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that said proposed will has been proven to be and is the last will and testament of said C D, now deceased, and that it be admitted to probate;

AND IT IS FURTHER ORDERED that said A B, who is named therein as the executor thereof, be and he is appointed such executor, and that letters testamentary thereon be and they are granted to the petitioner A B, and that such letters be issued to him on his giving a bond as required by law in the sum of ——— dollars, and on his taking an oath as such executor, as required by law.

[*Date.*] ————————,

Judge.

In case of a contest of the proposed will, the part within the brackets is to be inserted in place of the part between the figures 1 and 2.

FORM NO. 260.

CERTIFICATE ATTACHED TO A WILL ADMITTED TO PROBATE WHEN THERE IS NO CONTEST.

[*Title of Proceeding.*]

The court being satisfied upon the proof taken that the will of C D was duly executed, and that said C D at the time of its execution was of sound and disposing mind, and not acting under duress, menace, fraud or undue influence, it is certified that the proof is, and facts found are, that said C D was at the time of the execution of the will to which this certificate is attached, of the age of — years; that he died on the — day of ——, and he was a resident of said county of ——— at the time of his death; that said will is in writing, and was subscribed at the end thereof by said C D, the testator himself; that such subscription was made in the presence of K L and M N, the attesting witnesses thereto; that said C D at the time he subscribed said will declared to said attesting witnesses that the said will was his will; that said attesting witnesses signed said will as

such attesting witnesses at the end of the will at the request of said C D, and in his presence, and in the presence of each other; and that said C D was, when he executed said will, of sound and disposing mind, and was not acting under duress, menace, fraud or undue influence.

———,
Judge.

Attest the seal of the court this — day of ——.

[*Seal*] O P, *Clerk.*
By R S, *Deputy Clerk.*

FORM NO. 261.

CERTIFICATE TO BE ATTACHED TO WILL ADMITTED TO PROBATE IN CASE OF A CONTEST.

[*Title of Proceeding.*]

It appearing from the verdict of the jury [or from the decision of the court] that the will of said C D, deceased, was duly executed, and that the said C D at the time of its execution was of sound and disposing mind, and not acting under duress, menace, fraud or undue influence, it is certified that the proof is, and facts found are, that said C D was, at the time of the execution of the will to which this certificate is attached, of the age of — years; that he died on the — day of ——, and was a resident of said county of ——— at the time of his death; that said will is in writing, and was subscribed at the end thereof by said C D, the testator himself; that such subscription was made in the presence of K L and M N, the attesting witnesses thereto; that said C D at the time he subscribed said will declared to said attesting witnesses that said will was his will; that said attesting witnesses signed as such attesting witnesses said will at the end of the will at the request of said C D, and in his presence and in the presence of each other; and that said C D when he executed said will was of sound and disposing mind and was not acting under duress, menace, fraud or undue influence.

———,
Judge.

Attest the seal of the court this — day of ——.

[*Seal*] O P, *Clerk.*
By R S, *Deputy Clerk.*

FORM NO. 262.

PETITION FOR LETTERS OF ADMINISTRATION.

[*Title of Proceeding.*]

The petition of A B alleges and shows:

That C D died intestate on the — day of ——;

That he was a resident of said county of ——— at the time of his death;

[Or state other jurisdictional facts as in form 255.]

That your petitioner is the oldest surviving son of the decedent, and he is entitled to administer on the estate of said decedent;

That the names, ages and residences of the heirs of decedent, so far as known to your petitioner are, [state the name, age and residence of each heir so far as known to the petitioner]

That decedent left an estate consisting of property, described and of the value and character as follows, namely: [describe the property, its value and character.]

WHEREFORE your petitioner prays that, after notice given as required by law of this application, and proof that such notice was given, letters of administration on the estate of said decedent C D be granted to your petitioner.

A B,
Petitioner.

G H,
Attorney for the Petitioner.

When the petition is filed, the clerk must set the petition for hearing by the court and give notice of the hearing of the petition, as provided in section 1373 of the Code of Civil Procedure.

FORM NO. 263.

ORDER AND DECREE APPOINTING ADMINISTRATOR AND GRANTING HIM LETTERS OF ADMINISTRATION.

[*Title of Proceeding.*]

The petition of A B that he be appointed the administrator of the estate of C D, deceased, coming on regularly to be heard on the — day of ——, and it having been first proved that notice of such hearing had been duly given as required by law, and

witnesses having been sworn and examined, the court finds that said C D died intestate on the — day of ——, and that he was a resident of the said county of ——— at the time of his death; that A B, said petitioner, is the oldest son of said C D;

IT IS THEREFORE ORDERED AND DECREED that A B, said petitioner, be and he is appointed the administrator of the estate of C D, deceased; that letters of administration on said estate be granted to said A B, and that they be issued to him on his giving a bond to the state of California with sufficient sureties in the sum of ——— dollars, and taking an oath as such administrator as required by law.

[*Date.*]

———————,
Judge.

FORM NO. 264.

BOND OF EXECUTOR OR ADMINISTRATOR.

Know all men by these presents that, we ——— as principal and ——— and ———, sureties, are jointly and severally held and firmly bound to the state of California in the sum of ——— dollars, lawful money of the United States, to be paid to the said state of California, for which payment well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators jointly and severally, firmly by these presents.

Sealed with our seals and dated this — day of ——, A.D. —.

The condition of the above obligation is such, that whereas, by an order of the Superior Court of the state of California, in and for the county of ———, duly made and entered on the — day of ——, the above bounded A B was appointed the executor of the will [or the administrator of the estate] of C D, deceased, and letters testamentary [or letters of administration] were granted to, and were directed to be issued to said A B as such executor [or administrator] upon his executing a bond according to law, to the state of California in said sum of ——— dollars;

NOW, THEREFORE, if the said A B as such executor [or as such administrator] shall faithfully execute the duties of the trust

according to law, then this obligation to be void; otherwise to remain in full force and effect.

A B, [*Seal.*]
E F, [*Seal.*]
I J, [*Seal.*]

[*Venue.*]

E F and I J, the sureties named in the above bond, being severally duly sworn, each for himself, says: That he is a resident of the state of California, and a freeholder [or householder] therein, and that he is worth the said sum of ——— dollars [the amount of the penalty of the bond] over and above all his just debts and liabilities, exclusive of property exempt from execution.

[*Jurat.*]

E F,
I J,

FORM NO. 265.

ORDER APPOINTING APPRAISERS.

[*Title of Proceeding.*]

It is ordered that E F, K L and M N, three disinterested persons, be and they are appointed appraisers of the estate of C D, said deceased.

Dated this — day of ——.

———,
Judge.

A certified copy of this order attested by the clerk under the seal of the court should be delivered to the appraisers as their authority to act, and should be attached to the inventory when returned to the court. The appraisers should be sworn as follows before entering on the discharge of their duties:

FORM NO. 266.

OATH TO BE ATTACHED TO THE INVENTORY AND APPRAISEMENT.

[*Venue.*]

——— and ——— and ———, the appraisers appointed by the court to appraise the estate of said C D, deceased, being duly sworn, on oath, say: That they will truly, honestly and

impartially appraise the property of the estate of C D, deceased, exhibited to them, according to the best of their knowledge and ability.

[*Jurat.*] [*Signatures.*]

INVENTORY AND APPRAISEMENT.

	Value.	
Moneys in hands of executor or administrator	$	
	State how much	
Claim of decedent against the executor (or administrator)	.. ..	
The S. W. ¼ of section 7 north, range — E., M. D.M	5000	00
(This real estate was at the time of the death of the decedent his homestead, selected and recorded as such during his lifetime)		
Lot 2 in block —, in the city of ——, in the county of ——	1000	00
One horse named "Dick".....	50	00
One piano.	250	00
One cooking stove	10	00

[and so on as to all the property of the estate of the deceased in the manner indicated in section 1445, C. C. P.]

And we, said appraisers, estimate and appraise the property of the estate of the deceased above described at ——— dollars; and we report that the following property above described, namely: [describe such property] was at the time of his death the community property of himself and his surviving wife, E F, and that the residue of the property described in this inventory was his separate property;

And we return and report that the homestead described in this inventory was selected by the wife of the decedent out of his separate property, and that he did not join in such selection;

[Or we return and report that the homestead described in this inventory was selected from the community property of the decedent by himself [and wife] [or was selected by the decedent [and his wife] from his separate property] [or was selected by the wife of the decedent [and the decedent] from her separate property;]

And we further return and report that we have ascertained and appraised the value of said homestead at the time it was selected and recorded at the sum of ——— dollars;

[Or said homestead was appraised under the provisions of the Civil Code, and its appraised value was then ——— dollars; and we have determined and report that said premises so selected

and recorded as a homestead can be divided without material injury, and we have admeasured and set apart to the parties entitled thereto, such portions of said premises including the dwelling house thereon, as will amount in value to the sum of five thousand dollars;]

And we report the following full description of the portion of said premises to set apart by us as a homestead; [describe by metes and bounds the portion to set apart.]

[Or, we have determined, find and report that the premises so selected and recorded as a homestead cannot be divided without material injury.]

[*Date.*] *Signatures of Appraisers.*

[*Venue.*]

We, [state the names of the appraisers] being severally duly sworn, say: that the account of their services and disbursements in making this inventory is:

G H, one day's service, $

I J, one day's service, $

E F, one day's service, $

and that their disbursements were $———, [state for what.]

[*Jurat.*] *Signatures of Appraisers.*

[*Venue.*]

A B being duly sworn, says: That I am the executor of the will [or administrator of the estate] of C D, deceased, and that the foregoing inventory of the estate of C D, deceased, contains a true statement of all of the estate of said C D, deceased, which has come to my knowledge and possession, and particularly of all money belonging to the decedent, and of all just claims of the decedent against me.

[*Jurat.*] A B.

If there was no homestead selected and recorded there need be no report of the appraisers as to a homestead. If the homestead selected and recorded was ascertained and appraised at the time of such selection at a sum not exceeding $5000, or, if such homestead had been appraised as provided in the Civil Code, and such appraised value did not exceed $5000, or, if the appraised value of the homestead at the time of the death of the decedent did not exceed $5000, or, if the homestead was selected by the wife of the decedent out of his separate property, and he did not join in such selection, there need be no further report of the appraisers as to the homestead property.

When the inventory includes a report of the appraisers as to a homestead, and is filed, the court should make an order setting a day for the hearing of any objections thereto from any one interested in the estate. Code of Civil Procedure, sections 1475, 1476, 1478.

FORM NO. 267.

ORDER SETTING A DAY FOR THE HEARING OF REPORT OF THE APPRAISERS AS TO HOMESTEAD.

[*Title of Proceeding.*]

The inventory of the estate of C D, deceased, having been filed, and the appraisers having reported therein that the following described property [describe it] is a homestead, and their actions in relation thereto, the court sets the — day of —— at — o'clock — m. for hearing any objections to such report by any one interested; and the clerk of the court is directed to give notice of such time set for such hearing by posting a copy of this order in three public places in said county of ——— at least ten days before said — day of ——.

[*Date.*]

———————,
Judge.

FORM NO. 268.

ORDER SETTING APART TO THE SURVIVING HUSBAND OR WIFE A HOMESTEAD DULY SELECTED AND RECORDED.

[*Title of Proceeding.*]

The inventory of the estate of C D, said decedent, having been returned and filed in this court, and the appraisers having filed therein their report, and the report of such appraisers having shown that the real estate described therein, and hereinafter described was the homestead of the decedent and his surviving wife, [or her surviving husband] and the same having been appraised in said inventory at a sum not exceeding five thousand dollars in value, and the court having set the — day of —— at — o'clock — m. for hearing objections to said report by any one interested in the estate of C D, deceased, and notice of such hearing having been duly given, for the time, and in the manner directed by this court, and the matter coming on regularly to be heard on this — day of ——, and no one appearing and objecting to said report, [or ——— having objected to such report] and evidence having been introduced, the court finds therefrom that the real estate described in said report as, [describe the real

estate as described in the report] was at the time of the death of the decedent, the homestead of the decedent, and of E F, his surviving wife [or her husband] and was duly selected, designated and recorded as such homestead during the life of said C D, and that it does not exceed five thousand dollars in value;

NOW, THEREFORE, IT IS ORDERED AND DECREED that said report of said appraisers be, and the same is confirmed, and that said [describe the property] be, and the same is set apart for the use and benefit of E F, said surviving wife [or husband] of said decedent, to be her [or his] property.

[*Date.*] _____,

Judge.

FORM NO. 269.

ORDER ASSIGNING AND SETTING APART FOR A LIMITED PERIOD A HOMESTEAD SELECTED OUT OF THE SEPARATE PROPERTY OF THE DECEDENT WHEN HE OR SHE DID NOT JOIN IN SUCH SELECTION.

[*Title of Proceeding.*]

It appearing to the court from the inventory and the report of the appraisers therein returned and filed in this court in the matter of the estate of C D, deceased, that a homestead was selected, designated and recorded in the lifetime of the deceased by his wife [or her husband] out of his [or her] separate property, and that he [or she] did not join therein, and the court after such inventory and report were filed, having set the — day of —— at — o'clock — m. for the hearing of objections to the report by any one interested in the estate of the deceased, and it having been proven that notice of such hearing had been duly given for the time and in the manner as directed by the court, and the matter coming on regularly to be heard on this — day of ——, and no one appearing and objecting [or ——— appeared and objected] and evidence having been introduced and considered by the court, and the court being satisfied therefrom that said report is correct, and that the family of the deceased consists of E F, his surviving wife [or her surviving husband] and ——— and ———, minor children of the deceased;

IT IS THEREFORE ORDERED AND DECREED that said report of the appraisers of the estate of C D, deceased, be, and the same is confirmed;

AND IT IS FURTHER ORDERED AND DECREED that the said real property of the deceased, so selected and recorded as a homestead and described as [describe the property] be, and it is assigned and set apart as a homestead for the family of the decedent until the — day of ——.

[*Date.*]

————,

Judge.

FORM NO. 270.

ORDER AND DECREE ON THE HEARING WHEN THE APPRAISED VALUE OF THE HOMESTEAD PROPERTY EXCEEDS $5000, AND THE HOMESTEAD PROPERTY CAN BE DIVIDED.

[*Title of Proceeding.*]

The inventory of the estate of C D, said decedent, having been returned and filed in this court, and the appraisers having filed their report, and such report shows that the real estate described therein as the [describe the property selected as a homestead] was the homestead of the decedent, and E F, his surviving wife; and the same having been appraised in said inventory at a sum exceeding five thousand dollars in value, and said appraisers having determined and reported that said homestead property could be divided without material injury; and said appraisers having admeasured and set apart as a homestead, such portion of said homestead premises including the dwelling house as amounts in value to the sum of five thousand dollars, and made report thereof, giving a full description of the portion so set apart as a homestead, and the court having set the — day of —— at — o'clock — m. for hearing objections to said report by any one interested in the estate of C D, deceased; and notice of such hearing having been duly given, and the matter coming on regularly to be heard on this — day of ——, and no one appearing and objecting to said report, [or ——— having objected to said report] and evidence having been introduced and considered, the court confirms said report; and it is ordered that the follow-

ing portion of said homestead premises, namely: [describe the portion set off as a homestead] be and the same is set off to E F, the surviving wife of said decedent, to be her property.

[*Date.*] ——————,

Judge.

FORM NO. 271.

ORDER ON THE HEARING WHEN THE APPRAISED VALUE OF THE HOMESTEAD EXCEEDS $5000, AND THE HOMESTEAD PROPERTY CANNOT BE DIVIDED WITHOUT MATERIAL INJURY.

[*Title of Proceeding.*]

The inventory of the estate of C D, said decedent, having been returned and filed in this court, and the appraisers having filed their report, and such inventory and report having shown that the following described real estate, namely: [describe the property selected as a homestead] was the homestead of the decedent, C D, and of his surviving wife, E F, and was duly selected and recorded as such; and the same being appraised in said inventory at a sum exceeding five thousand dollars in value, and said appraisers having determined and reported that said homestead premises could not be divided without material injury, and the court having set the — day of —— at — o'clock — m. for hearing objections to said report by any one interested in the estate of C D, deceased; and notice of such hearing having been duly given, and the matter coming on regularly to be heard on the — day of ——, and no one appearing and objecting to said report, [or ——— appearing and objecting thereto] and evidence having been introduced and considered, it is ordered that said report be and the same is confirmed.

[*Date.*] ——————,

Judge.

These forms as to a homestead are based on sections 1474, 1475, 1476 and 1478 of the Code of Civil Procedure of California.

A certified copy of every final order respecting a homestead must be recorded in the office of the county recorder of the county where the homestead property is situated. Code of Civil Procedure, section 1486.

FORM NO. 272.

PETITION FOR AN ORDER SETTING APART A HOMESTEAD WHEN NO HOMESTEAD HAS BEEN SELECTED.

[*Title of Proceeding.*]

E F petitions the court and alleges and shows:

That she was the wife of C D, said decedent, and that she is his widow;

That said decedent left him surviving two minor children, namely, K L, who is now of the age of — years, and M N, who is now of the age of — years;

That the inventory of the estate of C D has been returned and filed, and that there is real property belonging to the estate of said C D suitable for a homestead for your petitioner and for said minor children;

That said C D never selected, or joined in the selection of, and had recorded, any homestead whatever;

WHEREFORE your petitioner prays that after due notice given, and a hearing had, this honorable court designate, set apart, and have recorded a homestead for your petitioner and said minor children.

[*Date.*] E F.

G H,
Attorney for Petitioner.

FORM NO. 273.

ORDER FOR NOTICE OF THE HEARING OF THE FOREGOING PETITION.

[*Title of Proceeding.*]

E F, the widow of C D, said decedent, having petitioned the court to designate, set apart, and have recorded out of the real property of the estate of C D, a homestead for her and K L and M N, two minor children of said decedent, the court fixes the — day of —— at — o'clock — m. as the time for hearing said petition; and the clerk of the court is directed to give notice of

such hearing by posting a copy of this order in three public places in said county of ——— at least ten days before said — day of ——.

Done in open court this — day of ——.

———,
Judge.

FORM NO. 274.

ORDER MADE ON THE HEARING.

[*Title of Proceeding.*]

E F, the widow of C D, said deceased, having petitioned the court to designate, set apart, and have recorded a homestead for herself and K L and M N, two minor children of C D, deceased, out of real property of said deceased; and the court having fixed the time of the hearing of said petition for the — day of —— at — o'clock — m., and directed notice thereof to be given by the clerk at least ten days before the time fixed for said hearing; and the matter coming on regularly to be heard on this — day of ——, and proof having been made that said notice was given as directed by the court, G H, Esq., appearing as attorney for the petitioner, and no one, [or I J, Esq., appearing in behalf of ———, a creditor of said C D, deceased] opposed said application; and evidence having been introduced, the court finds that the petitioner is entitled to a homestead as prayed for, and the court designates the following land, namely: [describe the land] which was the community property of said C D and said E F, his said surviving wife, [or which was the separate property of the deceased] as such homestead for said E F, said widow, and said K L and M N, said minor children.

[*Date.*]

———,
Judge.

If the property admeasured and set apart as such homestead, was the community property of the decedent and his or her surviving spouse, it may be set apart as such homestead absolutely. If it was taken from property which was the separate property of the decedent, such homestead can be set apart only for a limited period.

FORM NO. 276.

PETITION TO SET ASIDE EXEMPT PROPERTY.

[*Title of Proceeding.*]

E F petitions the court, and alleges and shows:

That she is the widow of C D, said deceased, and that he left him surviving two minor children, namely: K L, aged — years, and M N, aged — years; and that said minor children reside with and are supported by your petitioner;

That an inventory of the estate of the decedent has been returned and filed;

That said decedent was a farmer at the time of his death, and the following property described in said inventory is exempt from execution, namely: [describe such property as described in the inventory]

WHEREFORE your petitioner prays that said exempt property be set aside for the use and benefit of the family of said decedent.

[*Date.*] E F.

FORM NO. 277.

ORDER SETTING APART EXEMPT PROPERTY FOR THE USE AND BENEFIT OF THE FAMILY OF THE DECEDENT.

[*Title of Proceeding.*]

The inventory of the estate of C D, deceased, having been returned and filed, and E F, the widow of said decedent, having petitioned the court to set apart property of the estate of said decedent which is exempt from execution, for the use and benefit of his family, and said petition coming on regularly to be heard on this — day of ——, and evidence having been introduced, and the court finding therefrom that the following described property of the estate of said decedent is exempt from execution, namely: [describe the property.]

IT IS ORDERED that all of said property be and the same is set apart for the use and benefit of the family of said decedent.

[*Date.*] ————,

Judge.

FORM NO. 278.

PETITION FOR FAMILY ALLOWANCE.

[*Title of Proceeding.*]

E F petitions the court, and alleges and shows:

That your petitioner is the widow of C D, said deceased;

That said decedent left him surviving two minor children, namely: K L, of the age of — years, and M N, of the age of — years, and said minor children reside with and are supported by your petitioner;

That the inventory of the estate of said decedent has been returned and filed, and the inventoried value of said estate amounts to ——— dollars:

That the property which has been set apart for the use and benefit of the family of the decedent is insufficient for their support, and no family allowance has been made for their support;

WHEREFORE your petitioner prays that a reasonable allowance be made out of the estate of said decedent for the maintenance of his family, according to their circumstances, during the settlement of his estate.

[*Date.*] E F.

FORM NO. 279.

ORDER FOR FAMILY ALLOWANCE.

[*Title of Proceeding.*]

E F, the widow of C D, said decedent, having petitioned the court for an order for the payment of a family allowance out of his estate during the settlement of said estate, and said petition coming on regularly to be heard on this — day of ——, and evidence having been introduced and duly considered by the court,

IT IS ORDERED that the executor of the will [or the administrator of the estate] of C D, deceased, pay out of the estate of said decedent to E F, the widow of the deceased, for the maintenance of the family of the deceased, the sum of ——— dollars; and the further sum of ——— dollars on the first Monday of

each and every month hereafter, and during the settlement of the estate of said decedent, or until further order of this court.

[*Date.*] ———————,

Judge.

FORM NO. 280.

PETITION TO SET APART, AFTER PAYMENT OF EXPENSES OF HIS LAST ILLNESS, FUNERAL CHARGES AND EXPENSES OF ADMINISTRATION, ALL OF THE ESTATE OF THE DECEDENT TO HIS WIDOW OR MINOR CHILDREN, WHEN THE APPRAISED VALUE OF THE ESTATE DOES NOT EXCEED $1500.

[*Title of Proceeding.*]

The petition of A B alleges and shows to the court that she is the widow of C D, said decedent, and that ——— and ——— are his surviving minor children;

That the inventory of the estate of said decedent has been returned and filed, and such inventory shows that the value of the estate of said decedent does not exceed fifteen hundred dollars, and she alleges that such value is, in fact, less than fifteen hundred dollars.

WHEREFORE your petitioner prays that after the payment of the expenses of the last illness of the deceased, funeral charges and the expenses of the administration of his estate, the whole of said estate be assigned to your petitioner, subject only to the mortgages, liens and encumbrances thereon at the time of the death of the decedent.

[*Date.*] A B,

Petitioner.

FORM NO. 281.

ORDER TO SHOW CAUSE WHY THE ESTATE OF A DECEDENT SHOULD NOT BE ASSIGNED TO HIS WIDOW.

[*Title of Proceeding.*]

A B, the widow of C D, said deceased, having filed and presented to the court her petition showing that the inventory of the estate of said decedent has been

filed, and that it appears therefrom that the value of the whole estate of said decedent does not exceed fifteen hundred dollars, and praying that, after the payment of the expenses of the last sickness of said decedent, funeral charges and the expenses of the administration of his estate, the whole of the estate of said decedent be assigned to her, subject to the liens, mortgages and encumbrances thereon at the time of the death of the decedent;

IT IS ORDERED that all persons interested, be, and they are, required to appear at the court room of said court on the — day of —— at —— o'clock — m., and show cause, if any they have, why the whole of the estate of said decedent should not be assigned for the use and support of his family;

AND IT IS FURTHER ORDERED that notice thereof be given by the clerk of this court in the manner provided in section 1633 of the Code of Civil Procedure of this state.

[*Date.*]

————,
Judge.

FORM NO. 282.

ORDER ASSIGNING TO THE WIDOW OF A DECEDENT THE WHOLE OF HIS ESTATE.

[*Title of Proceeding.*]

A B, the widow of said C D, said deceased, having petitioned the court to assign to her, after the payment of the expenses of the last sickness of the decedent, funeral charges and the expenses of the administration of his estate, the whole of his estate, subject to whatever mortgages, liens and incumbrances there were on the estate of the decedent at the time of his death; and the court having ordered that all persons interested be required to appear before the court on this — day of —— at —— o'clock — m., to show cause why the whole of said estate should not be assigned for the use and support of the family of the decedent; and satisfactory proof having been made that notice thereof has been given as provided by law, and as directed by this court, and no person having appeared to show cause as so required, and the inventory of the estate

of said deceased having been returned and filed, and it appearing therefrom that the value of the whole of said estate does not exceed fifteen hundred dollars; and it appearing from other evidence that such value is less than fifteen hundred dollars,

IT IS ORDERED AND DECREED that after the payment of the expenses of the last sickness of the decedent, funeral charges and the expenses of the administration of his estate, the whole of the estate of said C D, deceased, be and the same is assigned to A B, the widow of said deceased, subject to whatever mortgages, liens or incumbrances there were on said estate at the time of the death of said deceased.

[*Date.*] ————,

Judge.

If there be no widow, and there are minor children, the petition and order should be for them. Code of Civil Procedure, 1469.

FORM NO. 283.

ORDER FOR PUBLICATION OF NOTICE TO CREDITORS OF A DECEDENT.

[*Title of Proceeding.*]

It is ordered that notice to the creditors of C D, said deceased, requiring all persons having claims against said deceased to exhibit them with the necessary vouchers to the executor of the will [or the administrator of the estate] of said C D, deceased, be published in the ———, a newspaper published in said county of ——, at least once a week for four weeks.

[*Date.*] ————,

Judge.

FORM NO. 284.

NOTICE TO CREDITORS OF A DECEDENT.

[*Title of Proceeding.*]

Notice is hereby given to the creditors of C D, said deceased, that all persons having claims against C D, said deceased, are required to exhibit them with the necessary vouchers to A B, the executor of the will [or the administrator

of the estate] of C D, said deceased, at the residence [or place of business] of said executor [or administrator] at [specifying where such residence or place of business is] within four [or ten] months after the first publication of this notice.

[*Date.*] A B,

Executor of the will [or administrator of the estate] of C D, deceased.

The notice must be for ten months when the estate exceeds in value ten thousand dollars, and for four months, when it does not. Code of Civil Procedure, section 1491.

FORM NO. 285.

EVIDENCE OF THE PUBLICATION OF SAID NOTICE.

[*Venue.*]

———, being duly sworn, says: That he is the printer [or foreman of the printers, or principal clerk of the printers] of the ———, a newspaper published in the county of ——, in the state of California, and that the notice, of which a copy is annexed to this affidavit, was published in said newspaper on [state each day of each month on which the publication was made.]

[*Jurat.*] *Signature.*

FORM NO. 286.

DECREE OF DUE AND LEGAL NOTICE TO CREDITORS.

[*Title of Proceeding.*]

It having been proven to the court that due and legal notice to the creditors of C D, said deceased, has been given, therefore

IT IS ORDERED AND DECREED by the court that due notice to such creditors has been given, and this order and decree is directed to be entered in the minutes of the court and recorded.

[*Date.*] ————,

Judge.

FORM NO. 287.

CLAIM AGAINST A DECEDENT, WHICH IS DUE.

[*Title of Proceeding.*]

E F exhibits his claim for ——— dollars against C D, deceased, to A B, the executor of the will [or the administrator of the estate] of C D, said deceased, with necessary vouchers, for allowance; said claim is on an account [or on a promissory note, or state other grounds for the claim] of which the following [or annexed] is a copy: [or statement] [Insert or annex copy of the account, note, or statement or other grounds for the claim]

[*Venue.*]

E F, being duly sworn, deposes and says: That he is the within [or above] named claimant, and that the amount of the foregoing claim [or the within claim] for ——— dollars is justly due: that no payments have been made thereon which are not credited, and there are no offsets to the same, to the knowledge of this affiant.

[*Jurat.*] E F.

FORM NO. 288.

CLAIM AGAINST THE ESTATE OF A DECEDENT WHICH IS NOT DUE.

[*Title of Proceeding.*]

E F exhibits his claim for ——— dollars principal, and the accruing interest thereon, against C D, said deceased, to A B, the executor of the will [or administrator of the estate] of C D, said deceased, for allowance.

The principal sum of said claim will not be due until the — day of ——. This claim is on a promissory note made by said decedent in his lifetime, [or state other grounds of the claim] and a copy of said promissory note [or statement] is annexed to this claim.

[Annex copy of note, or a statement of the grounds of the claim.]

[*Venue.*]

E F, being duly sworn, deposes and says: That he is the

within [or above] named claimant, and that the sum of ——— dollars, with the interest thereon from the — day of —— at the rate of —— per cent. per annum, the amount of said claim, is wholly unpaid; that said claim will be justly due on the — day of ——, and that no payments have been made thereon which are not credited, and there are no offsets to the same to the knowledge of the affiant.

[*Jurat.*] E F.

FORM NO. 289.

A CONTINGENT CLAIM AGAINST THE ESTATE OF A DECEDENT.

[*Title of Proceeding.*]

E F exhibits his claim for ——— dollars against C D, said deceased, to A B, the executor of the will [or the administrator of the estate] of said deceased for allowance; this claim is on a contingency, and the following are the particulars of said claim: [State them.]

[*Venue.*]

E F, being duly sworn, says that he is the within [or above] named claimant; that if said contingency occurs as stated in the within [or foregoing] particulars of said claim, there will be justly due to this claimant said sum of ——— dollars; that no payments have been made thereon which are not credited, and there are no offsets to the same to the knowlege of this affiant.

[*Jurat.*] E F.

FORM NO. 290.

CLAIM ON AN OBLIGATION AND A MORTGAGE OR LIEN.

[*Title of Proceeding.*]

E F exhibits his claim against C D, said deceased, for ——— dollars and the interest thereon from the — day of ——, at the rate of —— per cent. per annum, to A B, the executor of the will [or administrator of the estate] of C D, said deceased, with the necessary vouchers for allowance; said

claim is on a promissory note [or obligation] of which the following is a copy: [Insert copy] and the payment of said promissory note [or obligation] is secured by a mortgage [or other lien, state what it is] which has been recorded in the office of the recorder of the county of —— in the state of California, in which county the land affected by the mortgage [or lien] lies. Said mortgage [or lien] bears date the — day of ——, and mortgages [or gives a lien to claimant on, describe the land] and said mortgage [or lien] was recorded on the — day of —— in volume —, and on pages —— in book — of —— in the office of the county recorder of the county of ——, California, to which record reference is made.

A B.

[*Venue.*]

A B, being duly sworn, deposes and says: That the foregoing claim [or the within claim] for ——— dollars, and the accruing interest thereon as stated in said claim, is justly due [or said claim will be justly due on the — day of ——.]

That no payments have been made thereon which are not credited and there are no offsets to the same to the knowledge of the affiant.

[*Jurat.*] E F.

A claim may be verified and presented on behalf of the claimant, and in such case, the affidavit to the claim should set forth the reason why the affidavit is not made by the claimant. Code of Civil Procedure, section 1494 .

FORM NO. 291.

ALLOWANCE OR REJECTION OF A CLAIM BY AN EXECUTOR OR ADMINISTRATOR ENDORSED ON THE CLAIM.

The within claim is allowed for ——— dollars [and the interest thereon as claimed] [or is rejected] this — day of ——.

A B,

Executor [*or Administrator.*]

FORM NO. 292.

ALLOWANCE OR REJECTION OF A CLAIM BY THE JUDGE ENDORSED ON THE CLAIM.

The within claim is allowed for ——— dollars [and the interest thereon as claimed] [or is rejected] this — day of ——.

———,
Judge.

If an action was pending against the decedent at the time of his death, the plaintiff in the action must present his claim to the executor or administrator for allowance or rejection in a manner like that in which other claims are presented. and unless proof be made of such presentation no recovery can be had in the action. A judgment against a decedent for the recovery of money must be presented like any other claim. Code of Civil Procedure, section 1505.

FORM NO. 293.

PETITION TO SELL PERSONAL PROPERTY OF AN ESTATE WHERE NOTICE OF THE HEARING OF THE PETITION NEED NOT BE GIVEN.

[*Title of Proceeding.*]

A B, as the executor of the last will [or as the administrator of the estate] of C D, deceased, petitions and shows, that he as such executor [or administrator] has returned and filed an inventory of the estate of said deceased; that [describing it] which is the property of said estate, is perishable [or is likely to depreciate in value] [or if it be kept it will incur much loss and expense, or the sale thereof is necessary to pay the allowance to the family of the deceased.]

That said property is such that it would be more likely to sell at private sale for a higher and better price than it would sell for at public auction.

WHEREFORE your petitioner prays for an order for the sale of said property at private sale.

A B,
Executor [*or Administrator*] *of C D, Deceased.*

[*Duly verified.*]

FORM NO. 294.

ORDER FOR SALE OF PROPERTY OF A DECEDENT, MENTIONED IN THE LAST ABOVE FORM.

[*Title of Proceeding.*]

The petition of A B, as the administrator of the estate [or as the executor of the will] of C D, deceased, coming on to be heard this — day of ——, and it appearing to the satisfaction of the court that the following described property of the estate of said decedent, namely: [describe the property], is perishable [or is likely to depreciate in value, or the estate will incur much loss and expense by keeping it, or that the sale thereof is necessary to pay the allowance to the family of the deceased] and that said property will be likely to sell for a higher and better price at private sale, than it would at public auction,

IT IS ORDERED that said executor [or administrator] sell said property at private sale.

[*Date.*]

————,
Judge.

Such property may be ordered sold without any notice of the hearing of the petition for the sale.

FORM NO. 295.

PETITION FOR SALE OF PERSONAL PROPERTY OF THE ESTATE OF A DECEDENT WHEN NOTICE OF THE HEARING OF THE PETITION MUST BE GIVEN.

[*Title of Proceeding.*]

A B, as the executor of the will [or as the administrator of the estate] of C D, deceased, petitions the court and alleges and shows: That claims to the amount of ——— dollars against the estate of said deceased have been allowed and filed, and that the money of the estate in the hands of this executor [or administrator] does not in amount exceed ——— dollars, and that ——— dollars will probably be required to pay the expenses of the administration of said estate; and that the further sum of ——— dollars will probably be required to pay the allowance to the family of said decedent during the progress of the settlement of said estate: that the inventory of the estate of said

decedent has been returned and filed; that it will be necessary to sell the following described personal property belonging to the estate of said decedent: [describe the property.]

And that it will be for the best interest of the estate of said decedent and of those interested therein to sell the whole of the personal property of the estate of said decedent, not set apart for the use and benefit of his family. [That the property so set apart is the following, namely]; [describe it.]

[That said personal property can be sold for a higher and better price at private sale than it could be sold for at public auction.]

WHEREFORE your petitioner prays for an order authorizing and empowering him to sell [at private sale] the following described personal property belonging to the estate of said decedent, namely: [describe the property] [or the whole of the property belonging to the estate of said decedent remaining unsold and undisposed of, describing such property.]

A B,

The executor [or the administrator] of C D, deceased.

[*Duly verified.*]

FORM NO. 296.

ORDER THAT NOTICE BE GIVEN OF THE HEARING OF THE FOREGOING PETITION.

[*Title of Proceeding.*]

A B, as the executor of the will [or as the administrator of the estate] of C D, deceased, having on the — day of —— filed a petition for an order for the sale of personal property of the estate of said decedent, described in said petition [or the whole of the personal property of the estate of the decedent remaining unsold and undisposed of, described as follows, namely: [describe it.]

IT IS ORDERED that the — day of —— at ——— o'clock — m., is fixed for the hearing of said petition; and that notice thereof be given by the clerk of the court by posting notices as

required by law at least five days before said day so fixed for the hearing of said petition.

[*Date.*]

_____,
Judge.

FORM NO. 297.

ORDER FOR SALE OF PERSONAL PROPERTY.

[*Title of Proceeding.*]

A B, as the executor of the will [or as the administrator of the estate] of C D, deceased, having on the — day of —— filed a petition for the sale of personal property belonging to the estate of said decedent, and said petition coming on regularly to be heard on this — day of ——, and proof having been made to the satisfaction of the court that notice of such hearing had been given as required by law and the order of this court, and evidence having been heard, and it appearing to the court that such property should be sold [and that it is for the best interest of said estate and those interested therein that such sale be made]

IT IS ORDERED AND DECREED that said property described in said petition, namely, [describe the property] be sold by said executor [or administrator] at public auction in the manner required by law; [or it appearing to the satisfaction of the court that said property would be likely to sell at a higher and better price at private sale than it would at public auction,

IT IS ORDERED AND DECREED that said executor [or administrator] sell at private sale the property described in said petition, namely: [describe the property.]

[*Date.*]

_____,
Judge.

FORM NO. 298.

RETURN OF SALES OF PERSONAL PROPERTY.

[*Title of Proceeding.*]

A B, as the executor of the will [or as the administrator of the estate] of C D, deceased, returns and reports the following

sales of the property of the estate of said decedent under the order of sale made by this court on the — day of ——.

Such sales were made by said executor [or administrator] at public auction for gold coin, after giving at least ten days previous notice thereof by public notices posted in more than three public places in the said county of ———, which notices contained the time and place of the sale, and a brief description of the property to be sold.

Such sale was made at ———, which is a public place in said county of ———, and the property sold was present at the time of such sale.

The following is a brief description of each parcel of the property sold, the name of the purchaser thereof at such sale, the price for which each parcel of the property was sold, and the inventoried value thereof, namely:

Name of Purchaser	Description of Property	Price		Inventoried Value	
		$	cts.	$	cts.

The whole amount received from the sale of the property was ——— dollars;

That said sale was legally made and fairly conducted, and the money received on such sale was not disproportionate to the value of the property sold.

WHEREFORE said executor [or administrator] prays that an order be made confirming such sale.

[*Date.*] A B,

Executor [*or administrator*].

[*Duly verified.*]

The court may in its order and decree of sale order that the property sold need not be present at the time of sale, in which case the returns of sale need not state that the property sold was present at the time of sale.

If the court order the property sold at private sale, the notice and return need not state nor show that the place of sale was at a public place in the county.

The court for good cause shown may order that a shorter notice than a notice of at least ten days be given, in case of either a public or private sale.

FORM NO. 299.

ORDER FIXING TIME OF THE HEARING OF THE RETURN OF SALE.

[*Title of Court and Proceeding.*]

A B, as the executor of the will [or as the administrator of the estate] of C D, deceased, having returned and reported a sale of personal property of the estate of said decedent,

IT IS ORDERED that the — day of —— at ——— o'clock — m., be and is fixed for the hearing of said return and report, and the clerk is directed to give notice thereof by posting such notice in three public places in the county of ———, at least ——— days before the day so fixed.

[*Date.*]

———,
Judge.

FORM NO. 300.

ORDER CONFIRMING SALE OF PERSONAL PROPERTY.

[*Title of Proceeding.*]

A B, as the executor of the last will [or as the administrator of the estate] of C D, deceased, having on the — day of —— returned and reported the sale of personal property of the estate of the decedent, and the court having fixed the — day of —— at ——— o'clock — m. as the time of the hearing of said return and report, and having directed the clerk to give notice thereof, and it having been proven to the satisfaction of the court that such notice had been given as required by law and directed by the court, and the matter coming on regularly to be heard by the court on the — day of ——, and evidence having been heard, and it appearing to the court that such sale was legally made and fairly conducted, and that the price for which said property was sold was not disproportionate to its value,

IT IS ORDERED AND DECREED that said sale be, and it is confirmed.

[*Date.*]

———,
Judge.

FORM NO. 301.

PETITION OF SALE OF REAL PROPERTY OF THE ESTATE OF A DECEDENT.

[*Title of Proceeding.*]

A B, as the executor of the last will [or as the administrator of the estate] of C D, deceased, presents his verified petition to the judge of said court [or to said court] and alleges and states:

That said C D died on or about the — day of ——, testate [or intestate] and by the order of this court duly given and made on the — day of —— said will was admitted to probate, and letters testamentary thereon were granted to [or letters of administration on his estate were granted to] said A B, and he thereafter qualified as such executor [or such administrator], and such letters were thereafter and on the — day of —— issued to him as such executor [or administrator] and he has been ever since such executor; [or administrator.]

That your petitioner has returned and filed an inventory and appraisement of the estate of said decedent, and has published as required by law and the order of this court a notice to the creditors of said decedent, requiring them to exhibit their claims against said deceased;

That the amount of the personal property of the estate of said decedent which has come into the hands of your petitioner was of the value of $———, and of such personal property $——— in value has been set apart by this court for the use and benefit of the family of said decedent, and $——— in value of said personal property has been sold by your petitioner under the orders of this court, and $——— in value of such personal property remains in the hands of your petitioner undisposed of;

That the debts outstanding against said decedent so far as they can be ascertained or estimated are $———;

That this court made an order for an allowance to the family of said decedent and the amount due on such allowance is $———; and the amount which will be due thereon after the same has been in force for one year will be $———;

That the debts, expenses and charges of the administration of the estate of said decedent already accrued have been $———, and of this amount the sum of $——— remains unpaid;

That the only money of the estate in the hands of your petitioner is $———, and the debts due to the decedent or to his estate have all been collected, which are collectible, [with the exception of $———];

An estimate of the debts, expenses and charges of the administration of said estate which will or may accrue during the administration of said estate is $———;

That a general description of all real property of which the decedent died seized, and of the property in which he had any interest, and in which his estate has acquired any interest, and the condition and value thereof, and a statement of what part thereof is community, and what part thereof is separate property is contained in said inventory of his estate, to which reference is made, and is as follows:

1st: [Describe the property.] Said property is improved and has a dwelling house thereon; it is of the value of $———, and was the community property of the decedent and of E F, his surviving wife, and was selected by them during his lifetime as a homestead, and it has been assigned by this court as a homestead to said surviving wife.

[Or said property is the separate property of said decedent, and it has been selected, designated and set apart, and caused to be recorded by this court as a homestead for the term of ——— for the use of the surviving wife and the minor children of the decedent.]

2nd: [Describe the property and the interest of decedent therein.] This property was the separate property of the decedent; it is improved, fenced in, [describe briefly the improvements thereon] and is of the value of $———; [it is cultivated] and is of the rental value of $——— per annum.

[And so on, describing all of said property; and if the estate acquired any interest in property subsequent to the death of the decedent, state briefly what that interest is and how it was so acquired.]

That the names of the legatees and devisees of said decedent are: [Give their names, and as nearly as it can be ascertained where each one resides.]

That so far as is known to your petitioner, the following are

the names and residences of the heirs of the decedent, namely: [State such matters so far as known.]

That it is for the advantage, benefit and best interests of the estate of said decedent, and those interested therein, that a sale of the property herein petitioned to be sold, be made;

That if a sale of a portion thereof be made to pay the allowance of the family of said decedent, the debts outstanding against the decedent, and the debts, expenses and charges of the administration of his estate [and legacies bequeathed by his will], so little of such real estate will be left that the value of the part which would be distributed to each heir [or devisee] will be much less than the amount such heir [or devisee] would receive from a sale thereof, and the portion of the real estate which could be distributed to each heir would be of little value to him or her;

That it is therefore necessary to sell real estate of said decedent to pay the allowance to the family of the decedent, the debts outstanding against the decedent, and the debts, expenses and charges of the administration of his estate [and legacies bequeathed by his will] [and that it will be for the advantage, benefit and best interests of the estate of said decedent and of those interested therein, that the real estate of said decedent hereinafter asked to be sold, be sold

[That a higher and better price will, in the opinion of your petitioner, be realized from the sale of said property, if sold at private sale, than would be realized therefrom if the sale be made at public auction.]

WHEREFORE your petitioner prays for an order of this court authorizing and empowering your petitioner to sell the following described real property belonging to the estate of said decedent, [and which is the whole thereof undisposed of] namely: [describe the property asked to be sold], [and that such sale be made at public auction or private sale as your petitioner shall judge to be most beneficial for the estate].

A B.
Executor [*or administrator*].

[*Duly verified.*]

Facts should be stated in the petition, which, if proven, would satisfy the court that the real property or some part thereof should be sold.

No sale of the real estate of a decedent at private sale can be confirmed

unless the sale be made within six months after the order of sale is made, nor unless the property be appraised within one year next before the sale, nor unless it be sold for at least ninety per cent. of its appraised value.

FORM NO. 302.

ORDER TO SHOW CAUSE WHY AN ORDER SHOULD NOT BE GRANTED TO SELL REAL ESTATE.

[*Title of Proceeding.*]

It having appeared to the satisfaction of Hon. ———, judge of said court, [or to said court] from the petition of A B, as executor of the last will [or as the administrator of the estate] of C D, deceased, that it is necessary to sell the real estate asked to be sold in said petition, [or some portion thereof] to pay the allowance made by the court to the family of said decedent, the debts outstanding against said decedent, and the debts, expenses and charges of the administration of his estate [and the legacies bequeathed by his will] [and that the portion of the real estate not petitioned to be sold for such purposes, would after a sale for such purposes, be of such a character with reference to its future disposition among the heirs or devisees of said decedent as clearly to render it to be to the best interest of all concerned that the whole of the real estate asked to be sold by said petitioner, should be sold]; and said petition having been filed,

IT IS ORDERED that all persons interested in the estate of said decedent be and they are directed to appear before the court, at the court room of [department ——— of] said court on the — day of —— at ——— o'clock — m., to show cause why an order should not be granted to said executor [or administrator] to sell the real property of the estate of said decedent, described as follows, namely: [describe the property.]

AND IT IS FURTHER ORDERED AND DIRECTED that a copy of this order be published four successive weeks in the ———, a newspaper published in said county of ———, in this state.

[*Date.*]

———,
Judge.

FORM NO. 303.
ORDER FOR THE SALE OF REAL PROPERTY OF A DECEDENT.

[*Title of Proceeding.*]

A B, as the executor of the last will [or as the administrator of the estate] of C D, deceased, having heretofore petitioned that an order be granted to him as such executor [or as administrator] to sell certain real property of the estate of said decedent, and which real property is described in said petition, and is hereinafter described, and said petition having been filed and an order having been made to show cause why the prayer of said petition should not be granted;

Now on this — day of ——, at the court room of the court, the time and place appointed in such order [or the time and place to which the hearing of said petition was duly postponed] satisfactory proof having been made to the court by affidavit of the due publication of said order, as required by law and said order, and the court having proceeded to hear said petition, and to hear and examine the allegations and proofs of the petitioner and of persons interested in the estate of said decedent; and after a full examination and hearing of such allegations and proofs, it appearing to the satisfaction of the court that a sale of real estate of the estate of said decedent, is necessary for the payment of the allowance to the family of the decedent, the debts outstanding against the decedent, and the debts, expenses and charges of the administration of his estate [and for legacies bequeathed by the will of the decedent]; [and that a sale of the whole of the real estate of the decedent for the sale of which said petition prays, would be for the advantage, benefit and best interests of the estate of the decedent and those interested therein];

IT IS ORDERED that said executor of the last will [or said administrator of the estate] of said C D, deceased, sell at public auction, [or the same being asked for in the petition, sell at either public auction or private sale, as such executor [or administrator] shall judge most beneficial for the estate] the real property of the estate of the decedent hereinafter described;

IT IS FURTHER ORDERED that such sale be made for cash in gold coin of the United States, and that ten per cent. of the

purchase money therefor be paid at the time of sale, and the balance thereof be paid on the confirmation of the sale by the court;

IT IS FURTHER ORDERED that the said executor [or administrator] before making such sale, give an additional bond in the sum of ——— dollars as required by law and this order, [or it satisfactorily appearing to the court that the penalty of the bond heretofore given is equal to twice the value of the personal property remaining in, or that will come into the possession of the executor [or administrator], including the annual rents and profits and issues of the real estate, and twice the probable amount to be realized on the sale of the real estate [or it being expressly provided in the will of the decedent, that no bond shall be required of the executor],

IT IS ORDERED that no additional bond is required from the executor; [or administrator]

The following is a description of the real estate so ordered to be sold: [Insert description of property.]

———, *Judge.*

FORM NO. 304.

RETURN OF SALE OF REAL ESTATE OF A DECEDENT.

[*Title of Proceeding.*]

A B, as the executor of the last will [or as administrator of the estate] of C D, deceased, makes this return of the sales made by him of real property of the estate of said decedent, under and pursuant to the order for such sale granted to him by the court on the — day of ——;

That such sale was made at public auction on the — day of —— at ——— o'clock — m. of that day for cash in gold coin of the United States, and ten per cent. of the purchase money therefor was paid at the time of the sale and the balance of the purchase money is to be paid by the purchaser on the confirmation of the sale by the court; the sale was made by ———, Esq., an auctioneer employed by me as such executor [or as such administrator] for that purpose, in front of the court house door in the city [or town] of ——— in the county of ——— in the state of California, in which county the real estate sold is situated; that notice of such sale, and of the time and place of the

sale was posted in three of the most public places in said county of ———, namely: at [state where the notices were posted.]

And such notice was also published in [state name of newspaper] printed and published in said county of ———, for at least once a week for three weeks and more successively, next before such sale was made, which notice stated the terms on which the sale would be made, and described with common certainty the real estate to be sold; true copies of the notice so posted and published, and of the affidavits thereto, showing that the notice was so posted and published, marked Exhibit A, are attached to this return, and are referred to and made a part thereof;

That such sale was legally made and fairly conducted, and the sum bid for the real estate sold is not disproportionate to its value, and that in the opinion of this executor [or administrator] a greater sum therefor cannot be obtained; that at said sale E F was the highest and best bidder, and his bid at said sale for said real estate was ——— dollars and he paid on said sale ten per cent. of said bid, and is to pay the balance thereof on the confirmation of such sale to him.

A hearing upon this return of the proceedings of such sale is asked for, and this executor [or administrator] asks that on such hearing the sale be confirmed.

[*Date.*] A B,

Executor [*or administrator*].

[*Duly verified.*]

If the sale be of distinct parcels of the real estate, the return should show to whom each parcel was sold, and for what price. Exhibit A to be attached to the return.

FORM NO. 304a.

NOTICE OF SALE OF REAL ESTATE AT PUBLIC AUCTION.

[*Title of Proceeding.*]

Notice is hereby given that under and as required by the order of the [state the name of court], made and entered on the — day of —— in the matter of the estate of C D, deceased, I, as the executor of the last will [or as the administrator of the estate] of said C D, deceased, will sell at public auction in front of the court house door in the city [or town] of ——— in the

county of ———, in the state of California, on the — day of ——, at ——— o'clock — m., to the highest and best bidder for cash in gold coin of the United States, ten per cent. of the purchase money to be paid at the time of the sale and the balance of the purchase money to be paid on the confirmation of the sale by the court, the following described tracts of land, and all the right, title and interest the said deceased had therein at the time of his death, and all the right, title and interest which his estate has acquired therein since his death, [describe separately each tract of land to be sold.]

[*Date.*] A B,

Executor [*or administrator*].

[*Venue.*]

———, being duly sworn, says that he posted a notice of which the above is a copy, on the — day of ——, in each of the three most public places in said county of ———.

[*Jurat.*] *Signature.*

[*Venue.*]

———, being duly sworn, says that he is the printer [or foreman of the printers] [or principal clerk of the printers] of the ———, a ——— newspaper published in the county of ———, state of California, and that the notice of which the above is a copy, was published in said newspaper on the days following, namely: [state when] and for three weeks successively next before the — day of ——.

[*Jurat.*] *Signature.*

FORM NO. 305.

FIXING BY THE CLERK OF THE TIME FOR THE HEARING OF THE RETURN OF SALE.

[*Title of Proceeding.*]

A B, as the executor of the last will [or as the administrator of the estate] of C D, said deceased, having filed in the office of the clerk of said court his return of his proceedings on the sale of real property of said deceased, and having asked a hearing upon the return of the proceedings on such sale, the clerk

of said court fixes the — day of —— at ——— o'clock — m. for the hearing upon such return.

[*Date.*]

I J, *Clerk*
By K L, *Deputy.*

[*Title of Proceeding.*]

Notice is given that A B, as the executor [or as the administrator] of the estate of C D, deceased, has filed in the office of the clerk of said court his return of his proceedings on the sale of real property of C D, deceased, and has asked a hearing upon the proceedings in such return, and the clerk has fixed the — day of —— at ——— o'clock — m. for the hearing on said return, and notice is given that such return shows that [describe the land] was sold by said executor [or administrator] to E F for the sum of ——— dollars, and reference is made to said return for further particulars.

[*Date.*]

I J, *Clerk.*
By K L, *Deputy.*

The notice may be given by posting the notice in three public places in the county at least ten days before the hearing, or by publication of the notice in a newspaper of the county. An affidavit should be attached to said notice and filed, showing how the notice was given.

FORM NO. 306.

HEARING ON THE RETURN OF SALE, AND ORDER ON SUCH HEARING, AND THE DECREE THEREON.

[*Title of Proceeding.*]

The return of the proceedings by A B, as executor [or as administrator] of the estate of C D, deceased, on a sale of real property of the estate of said C D, deceased, coming on regularly to be heard on the — day of ——, and proof having been made to the satisfaction of the court that notice had been given as required by law of such hearing, and the court having examined said return and witnesses in relation to the same, and it appearing to the satisfaction of the court that the sale mentioned in the return was legally made and fairly conducted, and that at such sale E F bid for [describe the real estate bid for by him] the sum of ——— dollars; and that said bid is dis-

proportionate to the value of said real estate; but an offer in writing having been made in open court at such hearing by G H, a responsible person, of ——— dollars for said real estate, and said sum of ——— dollars not being disproportionate to the value of said real estate, the court accepts said offer and orders that the sale of said real estate be and it is confirmed to said G H for said sum of ——— dollars. And said executor [or administrator] is directed to execute to him a conveyance thereof on receiving from him said sum of ——— dollars.

[And it further appearing to the court that at such sale I J bid for [describe the real estate bid for by him] the sum of ——— dollars, and that said sum is not disproportionate to the value of said real estate for which such bid was made, and no offer having been made of a higher sum for said real estate,

[IT IS ORDERED that the sale of the real estate last above described be and is confirmed to said I J, and the said executor [or administrator] is directed to execute to him a conveyance thereof, on receiving from him the unpaid balance of the said sum bid by him therefor.]

[And so on as to each portion of the real property sold.]

[*Date.*]

———,
Judge.

FORM NO. 307.

NOTICE OF AN EXECUTOR'S OR ADMINISTRATOR'S SALE OF REAL ESTATE AT PRIVATE SALE.

[*Title of Proceeding.*]

Notice is hereby given that A B, as the executor of the will [or as the administrator of the estate] of C D, deceased, will, under and as directed by an order of said court made and entered on the — day of ——, in the matter of the estate of C D, deceased, sell at private sale for cash, ten per cent. thereof to be paid at the time of the sale, and the balance thereof is to be paid on confirmation of the sale, the following described real estate, the property of the estate of C D, deceased, namely: [Describe the real estate].

Such sale will be made on the — day of ——, and bids for

said real estate will be received by me at. [state the particular place, and the town or city and county in which such bids will be received.]

[*Date.*] A B,

Executor [*or administrator*].

The notice must be posted up in three of the most public places in the county in which the land to be sold is situated, and published in a newspaper published in that county, for at least once a week for at least two weeks successively next before the day on which bids for the property are to be received. And the return of the sale should show that this nad been done.

Before a sale of real estate by an executor or administrator is made, whether the sale be made at public auction or private sale, a bond should be given by the executor (or administrator), as provided in section 1389 of the Code of Civil Procedure, except in the cases mentioned in sections 1389 and 1396 of that code.

A return of a private sale of real estate of a decedent should be filed in a manner similar to the return of a sale at public auction, and the proceedings thereafter should be similar to the proceedings thereafter, when the sale is made at public auction.

Before a deed of the real estate sold is made by the executor, or administrator, he must cause a certified copy of the order of confirmation of the sale, and directing conveyance thereof to be executed, to be recorded in the county in which the land sold is situated.

FORM NO. 308.

DEED OF EXECUTOR OR ADMINISTRATOR.

THIS INDENTURE, made on the — day of ——, between A B, as the executor of the last will, [or as the administrator of the estate] of C D, deceased, the party of the first part, and E F, the party of the second part, *witnesseth*:

THAT WHEREAS, in proceedings had in the [name the court] in the matter of the estate of C D, deceased, said court on the — day of —— made an order authorizing said party of the first part to sell the real estate of said C D, deceased, hereinafter described, and the same having been sold as authorized and required by said order, and a return of said sale having been made, and said real estate having been sold to the party of the second part for the sum of ——— dollars, and the court on the hearing of said return of such sale having on the — day of —— made an order confirming such sale of said real estate to the party of the second part for said sum of —— dollars, and directing a conveyance to be executed; and a certified copy of the order

confirming the sale and directing a conveyance to be executed having been recorded in the office of the county recorder of ——— county, in which the land sold is situated, and reference being thereto made,

NOW, THEREFORE, in consideration of the premises and of the sum of ——— dollars paid to the party of the first part by the party of the second part, the party of the first part grants, bargains, sells and conveys to the party of the second part the [describe the land sold] [or if an interest only in the land be sold, describe such interest].

IN WITNESS WHEREOF the party of the first part has hereto subscribed his name as such executor [or administrator] and affixed his seal on said — day of ——.

A B, [SEAL.]

As the executor of the last will [or as the administrator of the estate] of C D, deceased.

FORM NO. 309.

RETURN OF SALE OF REAL ESTATE OF A DECEDENT, DIRECTED BY HIS WILL TO BE SOLD BY THE EXECUTOR OF THE WILL.

[*Title of Proceeding.*]

A B, as the executor of the will of C D, deceased, returns to the court his sale of real estate of said decedent, owned by him at the time of his death, directed by his will, which was admitted to probate by this court on the — day of ——, to be sold by the executor of his will [or by his will, admitted to probate on the — day of ——, authority was given to the executor of his will to sell] and which real estate is described as follows: [describe the real estate sold.]

That this executor sold said real estate on the — day of —— at private sale [or at public auction] to C D for ——— dollars in gold coin of the United States; ten per cent. thereof was paid at the time of the sale, and the balance of the purchase money is to be paid by said C D for said real estate on the confirmation of the sale by this honorable court. Said sale was legally made and fairly conducted and said sum for which said

real estate was sold is not disproportionate to its value, and this executor is of opinion that no higher or better price can be obtained for said real estate.

A hearing upon this return of the proceedings of such sale is asked for, and this executor asks that on such hearing the sale be confirmed.

A B,
Executor of the will of C D, deceased.

[*Duly verified.*]

A hearing on the return and notice of such hearing should be fixed and given by the clerk, and notice of such hearing should be, as in a sale of real estate of a decedent, in and by an executor (or administrator), under an order of the court. If the court on such hearing be satisfied that the sale was legally and fairly made, and that the sum for which the real estate was sold was not disproportionate to its value, the sale should be confirmed by the court, and the executor should by a decree of the court be directed to execute to the purchaser a conveyance of the real estate sold, on receiving from him the unpaid balance of the purchase money, and a certified copy of the decree should be recorded in the office of the county recorder of the county in which the land sold is situated. If the will contains directions as to how the real estate was to be sold, the return should show what those directions were and that they had been complied with. If notice was given by the executor of the sale, the return should show what such notice was, and how it was given.

FORM NO. 310.

PETITION FOR AN ORDER THAT AN EXECUTOR OR ADMINISTRATOR EXECUTE A CONVEYANCE OF LANDS SOLD BY A DECEDENT.

[*Title of Proceeding.*]

E F petitions the court and alleges:

I. That C D, said deceased, died in the county of ———, California, on the — day of ——, leaving a last will [or intestate] and this court by its order and decree, which were duly given and made on the — day of ——, admitted said last will to probate and granted to A B letters testamentary thereon [or appointed A B to be the administrator of the estate of C D, deceased, and granted to A B letters of administration upon the estate of C D, deceased] and thereafter A B qualified as such executor [or administrator] and such letters testamentary [or of administration] were issued to said A B on the — day of ——, and he has been ever since such executor; [or administrator]

II. That on the — day of —— a contract in writing was

made between your petitioner and said C D whereby said C D sold to your petitioner for the sum of ——— dollars to be paid to him by your petitioner therefor the following described tract of land, namely: [describe the land.] The following is a copy of said written contract, namely: [insert a copy of the contract.]

III. That at the time of the making of said contract your petitioner paid to said C D the sum of ——— dollars, a part of the contract price to be paid by your petitioner to said C D for said tract of land, and the residue of said purchase price, namely, the sum of ——— dollars, was not to be paid for such land until the — day of ——, and when such payment was made, said C D was by the terms of said contract to make to your petitioner a deed for said tract of land granting and conveying it to your petitioner;

IV. That said C D died before the said — day of ——, and the balance of said purchase money has not been paid, and no deed has been made, granting and conveying to your petitioner said tract of land;

V. That your petitioner is ready, able and willing, and he offers to pay to said A B, as said executor [or administrator] said sum of ——— dollars, the balance due from this petitioner on said purchase, on receiving from said A B, as such executor [or administrator], when authorized by the order and decree of this court to make such deed, a deed granting and conveying to your petitioner said tract of land.

WHEREFORE your petitioner prays that this court grant an order and decree authorizing and directing A B, as such executor [or administrator], on receiving from your petitioner for the benefit of the estate of C D, deceased, the said unpaid balance of the purchase money, to execute and deliver to your petitioner a conveyance of said land.

G H,
Attorney for the Petitioner.

[*Duly verified.*]

On the presentation of such petition, the court or a judge thereof will appoint a time and place for the hearing thereof, and order notice thereof to be published for at least once a week for at least four successive weeks in a newspaper designated by the court; and upon receiving satisfactory proof by affidavit or otherwise, of the publication of such notice, the court will at the time and place so appointed, or at the time and place to which the hearing may be continued, hear the matters embraced in said petition, and all objec-

tions thereto, and the court will examine on oath the petitioner, and will hear other evidence; and if the court on such hearing be satisfied that the petitioner is entitled on the payment of said unpaid balance of the purchase money to a conveyance of the land, the court will make and have entered a decree authorizing and directing the executor or administrator on such payment to execute a conveyance of the land to the petitioner.

A certified copy of this decree must be recorded in the county in which the land lies.

In case of the death of the person entitled to such conveyance before the commencement of the proceedings, his successor in interest may make the petition.

C. C. P. Sec. 1597-1607.

FORM NO. 311.

EXHIBIT.

[*Title of Proceeding.*]

A B, as the executor of the last will [or as the administrator of the estate] of C D, deceased, makes, as required by law [or by the order of said court], this exhibit of the condition of said estate, and shows:

That letters testamentary upon the will [or letters of administration upon the estate] of said decedent were issued to him as such executor [or administrator] on the — day of ——, and he has been ever since, such executor [or administrator];

That on the — day of —— he as such executor [or as such administrator] published in the ———, a newspaper of general circulation printed and published in said county of ———, a notice to the creditors of said decedent requiring all persons having claims against said decedent to exhibit them, with the necessary vouchers, to this executor [or administrator] at [state the place]; and such publication was continued each successive week thereafter at least once a week for ——— weeks;

That the following is a statement of the claims presented against the estate of said decedent, and which were allowed, allowed in part, or rejected:

Name of Claimant.	Amount of Claim. $ cts.	Allowed for. $ cts.
E F	$100.00	$100.00
K L	75.00	60.00
M N	200.00	Rejected.

[That actions have been commenced against this executor [or administrator] on the claims allowed in part, and on the claims rejected, and said actions are now pending.].

That the sum of ——— dollars has been received by him, and the sum of ——— dollars has been expended by him as such executor; [or administrator]

That an inventory and appraisement of the estate of the decedent have been returned and filed, and personal property of the appraised value of ——— dollars has been set apart as exempt by the court for the use and benefit of the family of the decedent, and real property of the estate of the decedent, namely: [describe the property], of the appraised value of ——— dollars has been assigned by the court out of the community property to E F, the surviving wife [or husband] of the deceased as a homestead;

[Or out of the separate property of the deceased there has been set apart by the court for a limited period real estate of the appraised value of $——— as a homestead, for the family of the deceased.]

That personal property of the estate of the decedent of the appraised value of ——— dollars has been sold under the order [or orders] of the court for the sum of ——— dollars, and the sale [or sales] thereof has [or have] been confirmed by the court; [and real property of the estate of the deceased of the appraised value of ——— dollars has been sold under the order of the court for ——— dollars, and such sale has been confirmed by the court, and conveyances of the real property so sold have been executed as directed by the court.]

That there remains property of the estate undisposed of, namely: Personal property of the appraised value of ——— dollars, and real property of the appraised value of ——— dollars.

[*Date.*] A B,

Executor [*or administrator*].

[*Venue.*]

A B, being duly sworn on oath says that he is the executor [or administrator] above named and that he has read the foregoing exhibit and knows the contents thereof, and that the same is true of his own knowledge.

[*Jurat.*] A B,

FORM NO. 312.

ORDER DIRECTING AN EXECUTOR OR ADMINISTRATOR TO DELIVER THE POSSESSION OF REAL ESTATE OF A DECEDENT TO HIS [OR HER] HEIRS OR DEVISEES UNDER THE PROVISIONS OF SECTION 1453 OF THE CODE OF CIVIL PROCEDURE.

[*Title of Proceeding.*]

The time limited for the presentation of claims against the estate of C D, deceased, having expired, and it satisfactorily appearing to the court that it is not necessary that the rents, issues and profits of the real property of the estate of said decedent be received by his executor [or his administrator] wherewith to pay the debts of said decedent, and that it will probably be unnecessary to sell such real estate or any part thereof to pay such debts;

IT IS ORDERED that said executor [or administrator] be and he is directed to deliver possession of all said real estate to the heirs at law of the deceased [naming them], or to the devisees of the deceased [naming them, and stating the portion of such real estate, which is to be delivered to each of them].

[*Date.*] _____,

Judge.

FORM NO. 313.

ACCOUNT OF EXECUTOR [OR ADMINISTRATOR].

[*Title of Proceeding.*]

A B, as the executor of the last will [or as the administrator of the estate] of C D, deceased, renders his first account as such executor [or administrator] for settlement, and accompanies such account with necessary vouchers.

A B, as the executor [or administrator] of the estate of C D, deceased, in account with said estate:

		$	Cts.
	Dr.		
Date.	To inventoried value of property received		
Date.	To money received from the rents, issues and profits of the estate of the decedent since the filing of the inventory,		
	To money received from the sale of property of the deceased in excess of its inventoried value		
	To money collected on the choses in action belonging to the estate of deceased in excess of their inventoried value,		
	Total		
	Cr.	$	Cts.
	By cash paid out in the administration of the estate of the deceased		
Date.	By inventoried value of the personal property of deceased sold		
Date.	By inventoried value of personal property set apart for the use and benefit of the family of the deceased.....		
	By the amount in which the money received on the sales of property of the estate of said deceased is less than its inventoried value		
	By the inventoried value of real estate, assigned or set apart for a homestead		
	By the inventoried value of horse described in the inventory as Dick and which died and was lost to said estate without the fault of the executor or administrator		
	By the inventoried value of the property of the estate on hand		
	Total		

Statement of cash received and paid out by the executor [or administrator] from the commencement of the administration of the estate until the rendering of this account:

Cash received as follows:

		$	Cts.
Date.	From sale of (describe the property sold) confirmed by the court on the ——— day of ———		
Date.	From sale of ——— sacks of wheat weighing ——— pounds at a sale made to E. F. on the ——— day of ———		
Date.	Cash collected on a promissory note given by E. F. on the ——— day of ———, for the sum of $———, and which note belonged to the estate... (Describe in like manner other moneys of the estate received by the executor or administrator.)		
	Total amount of money received		

Contra.

Cash paid out as follows:

		Voucher	$	Cts.
Date.	Paid Clerk of Court.....			
Date.	Paid ——— for funeral expenses of deceased			
Date.	Paid to the widow of deceased for the support of his family, And so on as to all expenditures, and to whom made, and what for.			
	Total,			
	Cash in hands of the Executor (or administrator)	$	Cts	

An executor or administrator is chargeable in his account with the inventoried value of the property of an estate if such property has come into his possession.

C. C. P. Sec. 1613. See also Sec. 1614.

Statement of claims presented and allowed, or allowed in part, and of claims presented and rejected:

Claim of ——— on a promissory note of the decedent for $———, allowed by the executor [or administrator] and by the judge for $———.

Claim of ——— for merchandise claimed to have been sold and delivered to the decedent, for $———, rejected by the executor [or administrator] on [give date].

Claim of ——— for labor performed for the decedent for $———, allowed by the executor [or administrator] and the judge for $———, and filed on [give date of filing].

[And so on as to each claim presented and its allowance in whole or part or its rejection.]

[*Date.*] A B,

Executor [or administrator] of the estate of C D, deceased.

State of California, county of ———: ss.

A B, being first duly sworn deposes and says: I am the executor of the will [or the administrator] of the estate of C D, deceased. The foregoing account being filed as and for the first annual account of my administration of said estate of C D, deceased, is in all respects full, true and correct, and said account exhibits all debts which have been presented, and allowed in whole or in part during the period embraced in the account, and all claims rejected. I further state that each item of the expenditures not exceeding $20.00 for which no voucher is filed, has been actually paid by me at the place where, the date when, and the person to whom, as in said account such payment is stated to have been made.

[*Jurat.*] A B,

FORM NO. 314.

REPORT ACCOMPANYING SAID ACCOUNT.

[*Title of Proceeding.*]

A B, as the executor [or as the administrator] of the estate of C D, deceased, reports to the court that as such executor [or administrator] he took into his possession all the property of the estate of C D, deceased, of which he had knowledge or information and returned to this court a correct inventory and

appraisement of the same on the — day of ——; that for at least once a week for more than four successive weeks, commencing on the — day of ——, he published in the ———, a newspaper of general circulation printed and published in said county of ———, a notice to all the creditors of said decedent requiring them to exhibit to this executor [or administrator] their claims against said decedent for allowance, and this court thereafter made, and had entered in the minutes of the court and had recorded, an order showing that due notice to the creditors of said decedent had been given; that the property of the estate mentioned in the account which this report accompanies, as having been destroyed [or as having decreased in value] was so destroyed [or decreased in value] without the fault of this executor [or administrator], and said account shows the condition of the estate of C D, deceased, the claims against his estate which have been presented and allowed in whole or in part, the claims against his estate which have been rejected and the inventoried value of his estate undisposed of, and the inventoried value of the property of the estate which has been disposed of.

[*Date.*] A B,

Executor [*or administrator*].

[*Duly verified.*]

FORM NO. 315.

APPOINTMENT BY THE CLERK OF A DAY FOR THE SETTLEMENT OF THE ACCOUNT, AND THE NOTICE THEREOF GIVEN BY THE CLERK.

[*Title of Proceeding.*]

A B, the executor of the last will [or administrator of the estate] of C D, deceased, having filed and rendered for settlement on the — day of —— his first [or state what the account is] account of his administration of said estate of C D, deceased, the clerk of the court appoints the — day of —— at ——— o'clock — m. for the settlement of said account.

[*Date.*] I J, *Clerk.*

By K L, *Deputy.*

FORM NO. 316.

NOTICE OF TIME FOR SETTLEMENT OF AN ACCOUNT OF AN EXECUTOR OR ADMINISTRATOR.

[*Title of Proceeding.*]

Notice is hereby given that A B, the executor of the will [or administrator of the estate] of C D, said deceased, did on the — day of ——, file and render for settlement his first [or other account; state what it is] of his administration of the estate of C D, said deceased, and that the clerk has appointed the — day of ——, at ——— o'clock — m. for the settlement of said account, when all persons interested in said estate may appear and they shall be heard.

[*Date.*]

I J, *Clerk.*
By K L, *Deputy.*

FORM NO. 317.

AFFIDAVIT SHOWING POSTING OF SAID NOTICE TO BE ENDORSED THEREON.

[*Venue.*]

G H, being duly sworn, says that he is a deputy clerk of E F, the clerk of said court, and that affiant posted a notice of which the within is a copy in three different public places in said county, namely: One at the court house door of the court house in said county of ———, [and state where each of the others were posted].

[*Jurat.*]

G. H.

FORM NO. 318.

CONTEST OF SUCH ACCOUNT.

[*Title of Proceeding.*]

E F, who is one of the heirs of C D, deceased, files his exceptions to the account of A B, the executor of the will [or the administrator of the estate] of said C D, deceased, rendered on the — day of ——, and contests the same, and as grounds of such contest shows:

1st. That the item for ——— dollars paid to I J contained in said account, is not supported by any voucher, and no greater amount was paid to said I J than the sum of ——— dollars;

2nd. That the claim of K L against the estate of said decedent for ——— dollars was not supported by the affidavit of the claimant or by the affidavit of any one in his behalf, that the amount thereof was justly due, that no payments had been made thereon which were not credited, and that there were no offsets to the same;

[And so on as to each item of the account contested showing a ground for such contest.]

WHEREFORE this contestant asks that said account be not settled and allowed as rendered.

[*Date.*]

M N,
Attorney for Contestant.

FORM NO. 319.

ORDER AND DECREE SETTLING AN ACCOUNT WHEN THERE IS NO CONTEST.

[*Title of Proceeding.*]

The account of A B, the executor of the will [or the administrator of the estate] of C D, deceased, which was rendered on the — day of ——, coming on regularly for hearing and settlement on this — day of ——, and it having been first proved to the satisfaction of the court that notice of such hearing and settlement has been given as required by law, and no one appearing to contest said account, and the court having examined said account and the vouchers in support thereof, and having heard and received evidence in respect to the same, and it appearing to the court that said account is supported by necessary vouchers and by the oath positive of said A B, the said executor [or said administrator], and that said account is in all respects full, just, true and correct, and should be settled and allowed as rendered;

IT IS ORDERED AND DECREED that said account be and the same is settled and allowed as rendered.

And the court decrees that there was at the time

of the rendition of said account the sum of ——— dollars, money of the estate of said C D, deceased, in the hands of said executor [or administrator].

[*Date.*] ————,

Judge.

If the account be contested the decree of the settlement of the account should state by whom, and the court should, even when there is no contest, examine carefully each item of said account, and each voucher, and have evidence introduced respecting the account, and should, in its decree settling said account, state what item, if any, of the account is found to be incorrect, and should decree what money, the property of the estate, was or should have been on hand when the account was rendered for settlement.

In each subsequent account, the account as to property, should state the inventoried value of the property of the estate on hand and not disposed of at the rendition of the last previous account; and the account as to money received and expended, should state the money on hand as stated and shown by the order of settlement of the last previous account; and when the account is rendered so that any order for the payment of claims against the estate may be made, the executor (or administrator) should credit himself with the commissions allowed him by law.

If it appears from an account of an executor (or administrator) when it is settled, that the debts and the expenses and costs of the administration of the estate have been paid, and that there is money in the hands of the executor (or administrator) for the payment of claims against the estate, the court should make an order for the payment of such claims, or for the payment of so much thereof as such money will pay.

FORM NO. 320.

ORDER FOR PAYMENT OF CLAIMS.

[*Title of Proceeding.*]

It appearing to the court on the settlement of the account of A B, the executor of the last will [or the administrator of the estate] of said C D, deceased, which settlement was made on the — day of ——, that said executor [or administrator] has in his hands as such executor [or administrator] money of the estate of the decedent applicable for the payment of claims against said decedent which have been allowed and filed in this court in the matter of said estate, and which are acknowledged debts of said estate to be paid in the due course of the administration of said estate;

IT IS ORDERED AND DECREED that said executor [or administrator] pay claims against said decedent out of the funds of the estate of said decedent in his hands as such executor [or administrator] as follows, namely:

To ———, one of such creditors, $———.

To ———, another of such creditors, $———.

[And so on as to all of such creditors.]

[Or it appearing to the court that there is not sufficient money of the estate in the hands of the executor [or adminisrator] to pay all claims against said estate in full, it is ordered and decreed that the executor [or administrator] pay such claims or portions, of said claims out of the funds of the estate of said decedent as follows, namely:]

To ———, one of said creditors, $———.

To ———, another of said creditors, $———.

[And so on as to all the creditors who should receive payment from such fund.]

[*Date.*]

———,

Judge.

When the debts of the decedent and the debts, costs and expenses of the administration are paid the final account of the executor (or administrator) should be filed. In this account the executor (or administrator) should charge himself with the money of the estate in his hands as shown by the settlement of his last previous account, and the money of the estate subsequently received by him, and credit himself with moneys paid out by him subsequent to the rendering of the last previous account in the administration of the estate of the decedent, and the money which thereafter it will probably be necessary to expend in the closing up of the estate.

The report accompanying this account should state briefly that all the debts of the decedent which had been allowed, and the debts, costs and expenses of the administration of the estate have been paid up to the rendition of said account, and that money of the funds of the estate (stating how much), had been reserved to pay the expenses of closing the estate, and then state what property of the estate there is for distribution among the heirs, devisees or legatees of the decedent.

Should an executor or an administrator unduly neglect to render an exhibit, or an account, within the time required by law, he may be compelled by the court to do so, on a petition by any person interested in the estate.

Such petition and the proceedings to be had by the court are stated in section 1623 and to section 1628 of the Code of Civil Procedure.

FORM NO. 321.

PETITION FOR SPECIAL LETTERS OF ADMINISTRATION.

In the Matter of the Estate of C D, deceased.

E F petitions the court and shows:

I. That C D died on or about the — day of —, leaving an instrument in writing which purported to be his last will and testament, and which was filed in this court on the — day of

——; and A B has petitioned this court to admit said instrument in writing to probate as a will, and to grant to him letters testamentary thereon; and that G H has contested the probate of said instrument in writing as the last will and testament of C D, deceased, and has filed in this court written grounds of opposition to the probate thereof, and a contest has arisen and is pending in respect to the probate of said instrument in writing as the will of C D, deceased;

II. That said contest will cause delay in granting letters testamentary or of administration upon the estate of said C D, deceased;

III. That the following described property of the estate of C D, deceased, [describe it] is perishable, and that I J, who was indebted to said C D at the time of his death, is about to leave the state of California for the purpose of avoiding the payment of said indebtedness, and that there is danger that said indebtedness will be lost to the estate of C D, deceased, unless an action be soon commenced for the collection of the same; and said C D left real and personal property in the state of California which should be taken charge of by a special administrator [or state any other grounds for the appointment of a special administrator, as indicated by section 1411 of the Code of Civil Procedure];

IV. That your petitioner is the oldest son of C D, deceased, and is one of his heirs, and as such would be entitled to letters of administration upon the estate of C D, deceased.

WHEREFORE your petitioner prays that this petitioner be appointed a special administrator of the estate of C D, deceased, with such powers as to this court may seem meet and proper, and that letters as such special administrator be issue to your petitioner.

E F,
Petitioner.

[*Duly verified.*]

FORM NO. 322.

ORDER APPOINTING A SPECIAL ADMINISTRATOR.

[*Title of Proceeding.*]

E F, a son of C D, deceased, having petitioned the court to be appointed special administrator of the estate of C D, deceased, and the court having heard the petition, and evidence in support of the allegations thereof; and the court being satisfied therefrom that such allegations are true, it is therefore ordered that E F be and he is appointed special administrator of the estate of C D, deceased; and that as such special administrator he collect and take charge of the estate of said C D in whatever county or counties of this state it may be found; that he collect indebtedness due the estate of said decedent, and commence an action or actions for that purpose; and that he sell perishable property of the estate of the decedent upon obtaining an order of this court for that purpose; and [state what other powers are given by the court to the special administrator]; and that this order be entered upon the minutes of the court; and after such entry, and after the giving of a sufficient bond by said E F, as such special administrator, to the state of California in the sum of ——— dollars, that the clerk of the court issue to said A B letters of administration as special administrator upon the estate of C D, deceased, in conformity with this order, and that his oath as such special administrator be endorsed on said letters.

[*Date.*]

———,
Judge.

FORM NO. 323.

PETITION FOR THE SUSPENSION AND REMOVAL OF AN EXECUTOR OR ADMINISTRATOR.

[*Title of Proceeding.*]

The petition of E F shows:

I. That A B is the executor of the will [or the administrator of the estate] of C D, deceased;

II. That your petitioner is a son of said decedent and is one of the legatees named in his will; [or he is one of the heirs of the decedent]

III. That said A B has long neglected to perform any act as the executor of the will, [or as the administrator of the estate] of C D, deceased; that he has done no act as such executor [or administrator] within the past ——— months; and said estate and those who are interested therein have suffered loss by such neglect [state any act or neglect of the executor or administrator, or of his mismanagement of the estate as indicated in section 1436, as a ground for the suspension of the executor or administrator and for the revocation of his letters.]

WHEREFORE your petitioner prays that the powers of said A B as such executor [or administrator] be suspended and that his letters be revoked.

E F,
Petitioner.

[*Duly verified.*]

FORM NO. 324.

ORDER SUSPENDING THE POWERS OF AN EXECUTOR OR ADMINISTRATOR, AND THAT A CITATION ISSUE.

[*Title of Proceeding.*]

A petition of E F, one of the legatees named in the will of C D, deceased [or one of the heirs of C D, deceased], having been presented to a judge of the court, and filed, and said judge of said court believing therefrom that A B, the executor of the will [or the administrator of the estate] of C D, deceased, has long neglected to perform any act as such executor [or administrator] and [state other facts shown by the petition],

IT IS ORDERED that the powers of A B as such executor [or administrator] be and the same are suspended until the matter is investigated; and that notice be given to said executor [or administrator] thereof; and that a citation be issued to A B, said executor [or administrator], to appear and show cause, on the — day of —— at ——— o'clock — m., why his letters testamentary [or of administration] should not be revoked; and that a copy of said petition of E F and of this order be served with such citation;

AND IT IS FURTHER ORDERED that this order be entered on the minutes of the court.

[*Date.*]

———,
Judge.

The proceeding to be had on a return of the citation is indicated in sections 1437 to 1440, both sections included, of the Code of Civil Procedure.

FORM NO. 325.

PETITION FOR LETTERS OF ADMINISTRATION DE BONIS NON.

[*Title of Proceeding.*]

E F petitions the court and shows:

I. That said C D died testate [or intestate] on or about the — day of ——; and thereafter under proceedings had in this court, by an order of the court duly given and made, the last will of C D, deceased, was admitted to probate, and letters testamentary thereon were issued to A B as his executor [or letters of administration upon the estate of C D, deceased, were issued to said A B]; and he continued to be such executor [or administrator] until his death [or his removal from his trust as such executor] [or administrator] as hereinafter shown;

II. That on the — day of ——, and before said A B had fully administered upon the estate of C D, deceased, said A B died [or he was removed from his trust as such executor [or administrator] and his said letters were revoked];

III. That your petitioner is a son of said C D, deceased, and as such is entitled to letters of administration on his estate;

WHEREFORE your petitioner prays that he may be appointed the administrator of the estate of C D, deceased, not administered on.

[And with the will annexed.]

E F,
Petitioner.

The giving of notice of the hearing of the petition and the order granting letters, the bond to be given, and the oath as administrator, and the letters issued, will be similar to the notice, order, bond, oath and letters in case of a petition for letters of administration. If notice to creditors has been fully given, no other notice need be given. If there be a question as to what property of the decedent has not been administered on, appraisers of such property should be appointed.

FORM NO. 326.

COMPLAINT FOR EMBEZZLEMENT OR FOR THE CONCEALMENT OF THE PROPERTY OF A DECEDENT.

[*Title of Proceeding.*]

G H [or A B] complains of E F and alleges and shows:

I. That C D died on or about the — day of ——, testate [or intestate] and in proceedings in the matter of the estate of C D, deceased, this court by its order duly given and made, admitted the last will of C D, deceased, to probate, and granted to A B letters testamentary thereon [or appointed A B the administrator of the estate of C D, deceased, and granted to A B letters of administration thereon]; and thereafter A B qualified as such executor [or administrator] and such letters testamentary [or of administration] were issued to him on the — day of ——, and he has been ever since such executor [or administrator], and that this complainant is such executor [or administrator] [or is one of the devisees named in said will] [or he is a son and one of the heirs of C D, deceased];

II. That in the lifetime of said C D and on or about the — day of —— said E F was in the possession of the following described goods and chattels, then, and at the time of the death of C D, the property of said C D;

III. This complainant alleges that said E F is suspected to have concealed said goods and chattels and knows where said goods and chattels are, but he denies knowledge thereof. [State any other ground for having cited the person complained of, as indicated in section 1459 of the Code of Civil Procedure.]

WHEREFORE this complainant prays that a citation issue to said E F and that he be examined on oath upon the matter of this complaint.

G H [or A B],
Complainant.

[*Duly verified.*]

FORM NO. 327.

ORDER FOR ISSUANCE OF A CITATION TO THE PERSON COMPLAINED OF.

[*Title of Proceeding.*]

G H [or A B] having made on oath a written complaint against E F that [state the substance of what is charged in the complaint];

IT IS ORDERED that a citation issue to said E F, requiring him to appear on the — day of —— at ——— o'clock — m. to be examined on oath upon the matter of such complaint; and that a copy of such complaint and of this order be served with the citation.

[*Date.*]

————,
Judge.

FORM NO. 328.

ORDER THAT THE PERSON COMPLAINED OF DISCLOSE KNOWLEDGE OF MATTERS MENTIONED IN THE COMPLAINT.

[*Title of Proceeding.*]

Complaint on oath having been made to this court by [state by whom] that E F has [state the acts complained of], and a citation thereupon having by the order of this court been issued and served with a copy of said complaint on said E F, and said E F having appeared in this court in obedience to said citation to be examined on oath upon the matter of such complaint, and the said E F having been examined on written interrogatories and answered the same and having signed said interrogatories, and the same having been filed [and witnesses having been examined on oath];

IT IS ORDERED that E F disclose his knowledge of [state the matters of which said E F should disclose his knowledge] to A B, the executor of the will [or the administrator of the estate] of C D, deceased.

[*Date.*]

————,
Judge.

Upon the complaint on oath of the executor (or administrator), a person who has been entrusted with any part of the estate of a decedent may be cited to appear and he may be compelled to render a full account of such property.
C. C. P. Sec. 1461.

FORM NO. 329.

PETITION FOR PARTIAL DISTRIBUTION.

[*Title of Proceeding.*]

E F petitions the court and alleges and shows:

That A B is the executor of the will [or the administrator of the estate] of said C D, deceased, and that more than ——— months have elapsed since the issuance of letters testamentary [or of administration] to said A B as such executor [or administrator];

That the will of said C D, deceased, has been admitted to probate and in and by said will there was devised and bequeathed to your petitioner property which is described as follows, namely: [describe the property.] [Or your petitioner is a son of the deceased and is one of his heirs and the other heirs of said deceased are [give their names and relationship to said deceased], and your petitioner is entitled to an undivided one- ——— of the property of the estate of said deceased which is to be distributed];

That said deceased at the time of his death owed but little money [or due notice has been given to the creditors of said deceased to exhibit their claims against said deceased and an order has been made and entered in the minutes of the court that such notice has been given and the time fixed in said notice for the filing and presentation of such claims has passed and all such claims which have been filed and presented and allowed, have been paid];

That all of the expenses of the administration of the estate of C D, deceased, have been paid and the probable further expense of the administration of said estate will not exceed ——— dollars.

WHEREFORE your petitioner prays that an order be made distributing to your petitioner the legacy [or share of the estate of C D, deceased] to which your petitioner is entitled, or such portion thereof as the court deems should at the present time be distributed to your petitioner, upon his, if required so to do, giving bond with security for the payment of his proportion of the debts of the estate of C D, said deceased.

[*Date.*]

E F,
Petitioner.

When a petition for partial distribution is filed, notice of the application by such petition, and when it will be heard, must be given personally to the executor or administrator; and must be given to all persons interested in the estate, in the same manner that notice is required to be given of the settlement of the account of an executor (or administrator). C. C. P. Sec. 1659.

At the time of such hearing, the executor or administrator, or any one interested in the estate, may appear and resist the application, and any other heir, devisee or legatee may make a similar application for himself. C. C. P. Sec. 1660.

FORM NO. 330.

ORDER AND DECREE OF PARTIAL DISTRIBUTION.

[*Title of Proceeding.*]

E F, one of the devisees of C D, deceased, [or one of the heirs of C D, deceased] having made application to the court by petition for an order distributing to him the estate, [or a portion of the estate] of C D, deceased, to which he is entitled; and it having been proven to the satisfaction of the court that due notice of the hearing of said application has been given, and said application coming on regularly to be heard by the court on the — day of ——; and at said hearing A B, the executor [or the administrator] of the estate of C D appeared and resisted [or did not resist] said application; G H, Esq., appearing for E F, said petitioner, and I J, Esq., appearing as attorney for said executor [or administrator] and evidence having been introduced, and the matter having been argued by counsel for the respective parties and submitted to the court, the court finds that E F is a legatee named in the will of C D, deceased, and that there was bequeathed to him the legacy mentioned in said petition; [or that he is a son and heir of said C D, deceased] that letters testamentary [or of administration] were issued to A B, said executor [or administrator] on the — day of ——.

That the estate of C D, deceased, is but little indebted and that a portion of the estate of C D, deceased, can be distributed to the petitioner E F without loss to the creditors of the estate; that the expenses of the estate of the decedent thus far incurred have been paid from the funds of the estate; that the sum of ——— dollars, money of the estate is in the hands of the administrator; that the expenses of administering such estate hereafter

will probably not exceed ——— dollars; that said E F is entitled to said legacy mentioned in said petition [or to a share of the estate of C D, deceased, which will be in the hands of the administrator of said estate for distribution after the debts of the estate and the remaining expenses of administering said estate are paid];

IT IS THEREFORE ORDERED AND DECREED that there be and there is granted to said petitioner a distribution of said legacy, [describing it] [or of the following property, describing it] as a partial distribution of said estate, (1) on the giving by the petitioner to the administrator of the estate of C D, deceased, a bond with sufficient sureties to be approved by a judge of this court in the sum of ——— dollars, conditioned for the payment by said E F, when required, of his proportion of the debts due from the estate of C D, deceased, not exceeding however the portion of the estate of C D, deceased, to which said E F is entitled.

(2.) [Or it appearing to the satisfaction of the court that the time for filing and presenting claims against the estate of C D, deceased, has expired, and that all such claims which have been presented and allowed have been paid, and the court being satisfied that no injury can result to the estate from this distribution, it is ordered that the giving of a bond by said E F is dispensed with.]

[*Date.*]

————,
Judge.

FORM NO. 331.

BOND TO BE GIVEN ON A DECREE OF PARTIAL DISTRIBUTION OF THE ESTATE OF A DECEDENT.

KNOW ALL MEN BY THESE PRESENTS: That we, E F, as principal, and M N and O P as sureties, are held and firmly bound to the executor of the last will [or the administrator of the estate] of C D, deceased, in the penal sum of ——— dollars, for which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators jointly and severally firmly by these presents.

Signed, sealed, and delivered this — day of ——.

The condition of this obligation is such that

WHEREAS, E F, said principal, has made application by petition to the Superior Court of the state of California in the county of ———, to grant to him a partial distribution of the estate of C D, deceased, and said court having granted said application to take effect on the giving by said E F a bond with sufficient sureties, in the sum of ——— dollars to the executor [or administrator] of C D, deceased, for the payment when required, of the proportion of said E F, of the debts of the the estate of C D, deceased, not exceeding the portion of the estate of C D, deceased, to which said E F is entitled.

NOW, THEREFORE, if said E F shall well and truly pay or cause to be paid to the executor [or the administrator] of C D, deceased, whenever required, the proportion of said E F of the debts of the estate of said C D, deceased, not exceeding the value of the legacy [or portion of the estate of C D, deceased,] to which said E F is entitled, then this obligation to be void, otherwise to remain in full force and virtue.

E F, [SEAL.]
M N, [SEAL.]
O P, [SEAL.]

[There must be affidavits of the sureties to the bond, showing the qualification and sufficiency of the sureties.]

Endorsed: Approved this — day of ——.

———,
Judge.

FORM NO. 332.

PETITION TO EXTEND TIME FOR CLOSING ESTATE.

[*Title of Proceeding.*]

A B, the executor of the last will of C D, deceased, and E F, K L, and M N, legatees and devisees named in said will, petition and show:

I. That C D, said deceased, died in said county of ———, on the — day of ——, leaving a last will;

II. That this court by its order and decree, which were duly given and made on the — day of ——, admitted said last will to probate, and granted to your petitioner A B, who was

named in said will as executor, letters testamentary thereon, and he qualified as such executor, and said letters testamentary were issued to him on the — day of ——, and he has been ever since such executor;

III. That your petitioners, E F, K L, and M N, are named as legatees and devisees in said will, and no other person is, or persons are, named as legatee or devisee, or as legatees or devisees, in said will;

IV. That the testator, said C D, deceased, by the provisions of said will limited the time for the administration upon the estate left by him to the period of six months from the time of the issuance of letters testamentary upon his will;

V. That said C D, deceased, left, on his death, estate of a value of over $10,000, and there were large sums of money due to him at the time of his death, and which became due on his death to the executor of his will, as such executor;

VI. That said A B, said executor, with diligence, since such letters were issued to him, has been collecting said debts, and has commenced actions for the collection of the same, and has prosecuted said actions with diligence, but there is a large amount of such debts that cannot be collected within the period of time limited by said will for the administration upon said estate left by C D, deceased.

VII. That it will be for the best interest of the estate and the beneficiaries under the will to have the administration upon the estate continued for a longer period of time than that designated in said will, and that it would be injurious to the estate and to such beneficiaries to have the administration brought to a close at the date designated therefor in said will.

WHEREFORE your petitioners ask that the date designated for closing said estate in said will be extended by the court for such time as to the court may seem just and proper.

G H,
Attorney for the Petitioners.

Section 1670 of the Code of Civil Procedure states clearly what steps should be taken to have such time extended by the court.

FORM NO. 333.

PETITION FOR DISTRIBUTION, FILED WITH THE FINAL ACCOUNT OF AN ADMINISTRATOR.

[*Title of Proceeding.*]

A B, the administrator of the estate of C D, deceased, files with his final account his petition as such administrator for the distribution of the estate of said decedent among those entitled thereto, and alleges and shows:

That said decedent left E F, his surviving wife, who is still living, and ——— and ———, his only surviving children, who also are still living; and he left no other descendants;

That your petitioner files this petition for the distribution of the estate of said decedent with his final account as such administrator;

That the following described property, which is now ready for distribution, was the community property of said decedent at the time of his death, and of his said surviving wife, namely: [describe such property].

That the following described property which is now ready for distribution, was at the time of the death of said decedent his separate property; [describe such property].

That there is no other property of the estate of said decedent, of which your petitioner has any knowledge or notice, to be distributed among his heirs.

WHEREFORE your petitioner prays for an order and decree of this court, distributing to said surviving wife one ——— of said community property, and one ——— of said separate property, and of any other property of said decedent that may be hereafter discovered; and to each of said children an equal one ——— of said community property and an equal one ——— of said separate property, and of any property of said decedent which may hereafter be discovered;

And your petitioner will ever pray, etc.

[*Date.*]

A B,
Administrator.

G H,
Attorney for the Petitioner.

An executor or an administrator can file with his final account a petition for the distribution of the estate of his testator or intestate to those entitled thereto; or upon the settlement of the final account of such executor or ad-

ministrator, or at any subsequent time, such executor or administrator, or any heir, legatee, devisee, or any person interested in the estate of a decedent may file such petitions. When such petition is filed the clerk of the court must set the petition for hearing by the court and give notice thereof.

C. C. P. Secs. 1634, 1665, 1668.

FORM NO. 334.

APPOINTMENT BY THE CLERK OF A DAY FOR THE SETTLEMENT OF A FINAL ACCOUNT, AND SETTING A PETITION FOR DISTRIBUTION FOR HEARING BY THE COURT.

[*Title of Proceeding.*]

A B, the executor of the will [or the administrator of the estate] of C D, deceased, having filed his final account of his administration of said estate, and having filed therewith a petition for the distribution of said estate to the persons entitled thereto, the clerk of the court appoints the — day of ——, at ——— o'clock — m., for the settlement of said account; and the clerk of the court sets the same time for hearing said petition by the court.

[*Date.*]

I J, *Clerk.*
By K L, *Deputy.*

FORM NO. 335.

SETTING OF A TIME FOR THE HEARING BY THE COURT OF A PETITION FOR DISTRIBUTION.

[*Title of Proceeding.*]

The final account of A B, the executor of the will [or the administrator of the estate] of C D, deceased, having been settled and allowed, and A B, said executor [or administrator] [or E F, a person interested in the estate of C D, deceased] having filed a petition for the distribution of the estate of C D, deceased, to those entitled thereto, the clerk of the court sets the time for the hearing of said petition by the court on the — day of ——, at —— — o'clock — m.

[*Date.*]

I J, *Clerk.*
By K L, *Deputy.*

[*Seal of Court.*]

FORM NO. 336.

NOTICE OF THE RENDERING OF THE FINAL ACCOUNT OF AN EXECUTOR OR ADMINISTRATOR, AND OF FILING A PETITION FOR A DISTRIBUTION OF THE ESTATE OF THE DECEDENT.

[*Title of Proceeding.*]

Notice is hereby given that A B, the executor of the last will [or the administrator of the estate] of C D, deceased, has filed and rendered for settlement, on the — day of —— his final account of his administration of said estate, and that he filed therewith his petition for the distribution of the residue of said estate to the persons entitled thereto, and that the clerk of the court has appointed the — day of —— at ——— o'clock — m., for the settlement of said account, and has fixed the same time for the hearing of said petition by the court, and all persons interested in said estate may appear at that time, and they will be heard.

[*Date.*] E F, *Clerk.*

By K L, *Deputy.*

An affidavit of the posting of said notice should be made on a copy thereof and filed.

FORM NO. 337.

NOTICE OF TIME SET FOR HEARING PETITION FOR DISTRIBUTION.

[*Title of Proceeding.*]

A B. the executor of the will of [or the administrator of the estate of] C D, said deceased, having filed and rendered his account of the administration of the estate of C D, said deceased, and said account having been settled and allowed, and [E F, who is interested in the estate of C D, deceased] having filed his petition for the distribution of the estate of C D, deceased, to the persons entitled thereto, notice is given that the clerk of said court has set said petition for hearing by the court on the — day of ———, at ——— o'clock — m., and all persons interested in said estate may appear at that time, and they will be heard.

[*Date.*] I J, *Clerk.*

By K L, *Deputy.*

An affidavit of the giving of the notice should be made on a copy thereof and filed. C. C. P. Sec. 1668.

FORM NO. 338.

DECREE OF DISTRIBUTION OF THE ESTATE OF A DECEDENT.

[*Title of Proceeding.*]

A B, the administrator of the estate [or the executor of the will] of C D, deceased, having on the — day of —— rendered his final account as such administrator [or executor] for settlement, and having filed with such account his petition for a distribution of the estate of said decedent, and it having first been proved to the satisfaction of the court that notice of such settlement and of the hearing of such petition has been given according to law, and the court having settled and allowed said final account, and having heard evidence as to the matter of said distribution; G H, Esq., appearing as counsel for the petitioner, and I J, Esq., appearing for the heirs of said decedent; and the court finds from the evidence that the [describe the property which the court finds to be community property], was at the time of the death of said decedent the community property of himself and of E F, his surviving wife; and that [describe the separate property of the decedent] and any other property that may hereafter be discovered was at the time of his death, his separate property;

That he left, when he died, E F, his surviving wife, and ——— and ———, who are his surviving children, and that all of such persons are now living, and that he left no other heirs at law;

And the court finds as CONCLUSIONS OF LAW:

That said surviving wife of the decedent is entitled to ——— of said community property and to ——— of said separate property; and that each of said surviving children is entitled to ——— of said community property, and to ——— of said separate property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED, that there be and is distributed to said E F, said surviving wife, an undivided ——— of the said community property, namely: of [describe the community property]; and that there be and is distributed to each of said surviving children of said deceased, namely: to said ——— and ——— each, an undivided ——— of said community property, namely: of [describe the community property]; and that there be and is distributed to said E F,

said surviving wife, an undivided ——— of the said separate property of said deceased, namely: of [describe the property]; and of all property of said deceased that may be hereafter discovered; and that there be and is distributed to said surviving children of said decedent, each, namely: to said ——— and ——— each an undivided ——— of said separate property, namely: of [describe the separate property]; and of any other property of said deceased which may be hereafter discovered. [*Dated.*]

———,

Judge.

A similar form may be used in case of a distribution when there is an executor, and the distribution is to legatees and devisees.

If the heirs of a decedent be not known and have not been ascertained they may be ascertained in California, under proceedings instituted to have the court ascertain and determine who such heirs are.

FORM NO. 339.

PETITION OF AN HEIR OF DECEDENT WHEN THE HEIRS OF THE DECEDENT ARE NOT ALL KNOWN.

[*Title of Proceeding.*]

A B petitions, alleges, and shows:

That your petitioner is a son of K L, a brother of said C D, deceased, and that said C D, deceased, died intestate, and did not leave at his death him surviving any wife or child or children, or any descendant or descendants, or father or mother; and there is no descendant or child of C D, deceased;

That the father of your petitioner died before the death of said C D, and that said C D, deceased, did not leave any will, and that your petitioner is an heir of said deceased;

That letters of administration on the estate of said deceased were granted to E F as such administrator by this court, and were issued to him as such administrator on the — day of ——, and he has been ever since such administrator, and said letters have not been revoked; and more than one year has expired since the issuance of said letters of administration;

That it is not known who all the heirs of C D, said deceased, are.

WHEREFORE your petitioner prays that this court ascertain

and declare the rights of all persons to the estate of said decedent, and to all interests therein, and to whom distribution thereof should be made.

[*Date.*] G H,

Attorney for Petitioner.

[*Duly verified.*]

FORM NO. 340.

ORDER ON THE FOREGOING PETITION.

[*Title of Proceeding.*]

A B, one of the heirs of said C D, deceased, having filed his petition praying that the court ascertain and declare the rights of all persons to the estate of C D, deceased, and to all interests therein, and to whom distribution thereof should be made;

IT IS ORDERED AND DIRECTED that notice to all persons interested in said estate be given by the clerk of the court that they appear and show cause on the — day of ——;

That said notice shall set forth the name of said deceased, the name of the administrator of his estate, the names of all persons who have appeared and claimed any interest in the estate of said deceased in the course of the administration thereof up to the time of making this order, and a description of the real estate whereof said deceased died, seized or possessed, so far as known, described with certainty to a common intent; and said notice shall notify all of said persons, and all persons named or not named, having or claiming any interest in the estate of said deceased, requiring them to appear on said — day of ——, and that they, as required by law, show cause and exhibit to the court their respective claims of heirship, ownership, or interest in said estate of C D, deceased.

[*Date.*] ————,

Judge.

FORM 340a.

CITATION.

[*Title of Proceeding.*]

THE PEOPLE OF THE STATE OF CALIFORNIA TO:

A B, the administrator of the estate of C D, deceased, to [state the names of the persons who have appeared in the proceeding] and to all persons having or claiming any interest in the estate of C D, deceased, whether named or not named in this citation and notice;

NOTICE IS HEREBY GIVEN, pursuant to and as directed by the order of this court, made and entered in this proceeding on the — day of ——, that the name of said deceased is C D; that the name of the administrator of his estate is A B; that the names of the persons who have appeared, claiming an interest in the estate of said C D, deceased, in the course of the administration thereof up to the time of making said order are; [state their names].

That a description of the real estate of which said deceased died, seized, or possessed, so far as known, is as follows: [describe such property]

And you are cited and required to appear in said court on the — day of ——, and file your written appearance in said proceeding in person, or by your authorized attorney, and show cause, and, as required by law, exhibit to the court your respective claims of heirship, ownership, or interest in said estate of C D, deceased.

Witness the hand of the clerk of the court and the seal of the court this — day of ——.

[*Seal of Court.*]

J K,
Clerk.

The citation and notice must be served in the same manner as a summons in a civil action. Such service may, on an order of the judge made in a proper case, be served by publication.

Evidence must be produced to the court of the service of this notice as required by law, and the court will then make an order that the proof of such service thereof is established.

FORM NO. 341.

ORDER OF COURT ESTABLISHING PROOF OF SUCH SERVICE.

[*Title of Proceeding.*]

The petitioner, A B, having filed and presented to the court evidence that notice has been given and served as directed by the order of this court, made and entered on the — day of ——, in the matter of the estate of C D, deceased, and it appearing to the satisfaction of this court that such notice has been duly served;

IT IS ORDERED AND DECREED that proof of the service of such notice is established.

[*Date.*]

——————,
Judge.

FORM NO. 342.

APPEARANCE IN THE PROCEEDING.

[*Title of Proceeding.*]

K L appears in person [or by G H, his attorney] in said proceeding and claims that he is an heir [or a grantee from S T, an heir] of said C D, deceased, and that he has an ownership and interest in the estate of said decedent.

[*Date.*]

K L,
Or I J, *Attorney for* K L.

FORM NO. 343.

ORDER OF COURT ENTERING A DEFAULT.

[*Title of Proceeding.*]

The time for appearing in this proceeding as required by law having expired, IT IS ORDERED AND ADJUDGED that all persons who have not appeared in this proceeding within the time required by law and the notice to appear served in this proceeding, are in default.

[*Date.*]

——————,
Judge.

Within twenty days after the entry of the order and decree establishing proof of the service of the notice, any person who has appeared in said pro-

ceeding may file his complaint in the matter of the estate, in which he should set forth the facts constituting his claim of heirship, ownership, or interest in the estate and serve a copy thereof, as directed in section 1664 of the Code of Civil Procedure, and the persons thus served are allowed twenty days to plead thereto; and thereafter proceedings may be had as in civil actions.

FORM NO. 344.

COMPLAINT OF AN HEIR TO HAVE DETERMINED HIS HEIRSHIP, AND THE SHARE OF THE ESTATE OF A DECEDENT TO WHICH AS SUCH HEIR HE IS, AND OTHERS ARE, ENTITLED.

[*Title of Proceeding.*]

A B, as Plaintiff,

v.

M N, O P, and Q R, and others, Defendants.

A B complains and alleges:

I. That proceedings have been commenced and are pending in the matter of the estate of said C D, deceased, to have the court determine who are the heirs of said C D, deceased, and to determine the ownership or interest in the estate of C D, deceased, of all persons who may claim to be his heirs, or who claim ownership of, or an interest in, his estate, and to determine the share of the estate of C D, deceased, to which each heir and person is entitled, and notice of said proceeding and of the pendency thereof, has been ordered to be given, and has been given;

II. That on the — day of —— the court entered a decree in the proceeding, establishing proof that said notice had been served on all persons having or claiming any interest in the estate of C D, deceased;

III. That within the time limited in said notice this complainant appeared in said proceeding and through G H, his authorized attorney, who filed at the time written evidence of his authority so to appear, and filed his written appearance in the proceeding, and twenty days have not expired since the time of said decree establishing proof of the service of said notice;

IV. That the complainant is the only son and is the only descendant of K L, a brother of the decedent C D, and K L died in the lifetime of said C D;

V. Said decedent C D died intestate, and he had not at the time of his death any father, or mother, or child, or descendant, and he had no descendant; and this complainant is one of his heirs, and as such heir, is entitled to a share of his estate;

VI. That the defendants, M N, O P, and Q R, claim some ownership of, or interest in, the estate of C D, deceased, as his heirs or otherwise, and each of them has filed his written appearance in said proceeding.

WHEREFORE this complainant prays that each of said defendants, M N, O P, and Q R, and each person who may file a written appearance in the proceeding within the time required by law, be required within twenty days after service on him of a copy of this complaint, to answer this complaint; and that if he do not answer the complaint within twenty days after the service of said copy on him, or his attorney in said proceeding, his default be entered for failure so to do; and that each of said defendants be required to set forth in his answer the facts constituting his claim of heirship, ownership of, or interest in, said estate of C D, deceased; and that the court ascertain and determine the heirship to the estate of said C D, deceased, the ownership of his estate, and the interest of each respective claimant who has appeared or may appear in said proceeding thereto and therein;

And that the court adjudge the share of the estate of C D, deceased, to which each person who has appeared in said proceeding, and whose default for not answering this complaint has not been entered, is entitled to have distributed to him.

G H,
Attorney for Plaintiff.

After this complaint is filed a copy thereof must be served in the manner required by law on each of the parties who have entered, or may enter as required by said notice, their appearance in the proceeding if they reside in the county; or if they or any of them do not reside in the county, the service of the copy of the complaint shall be made upon the clerk of the court for such of them as do not reside in the county, and the clerk of the court shall forthwith mail the same to the address of such party or his attorney, who has left with the clerk his postoffice address.

The parties served with a copy of the complaint within twenty days after such service, may demur to the complaint or answer, as in ordinary civil actions. If a party answer, he should set forth in his answer the facts which constitute his claim of heirship, ownership, or interest in the estate of the decedent.

The court may on proper application therefor enter the default of all persons failing to appear, or plead, or to prosecute or defend their rights.

The proceedings after the service of a copy of the summons should be in a manner like proceedings in ordinary civil actions.

The court, after the trial, should enter its decree determining the heirship to said decedent, the ownership of his estate, and the interest of each respective claimant thereto or therein, and the persons entitled to a distribution thereof, and the portion thereof which should be distributed to each.

FORM NO. 345.

JUDGMENT OF HEIRSHIP, OWNERSHIP, AND INTEREST IN THE ESTATE OF A DECEDENT, AND THE SHARE OF HIS ESTATE TO WHICH EACH OF THEM IS ENTITLED.

[*Title of Proceeding.*]

A B, as Plaintiff,

v.

M N, O P, and Q R, and others, Defendants.

A B, an heir of C D, deceased, having on the — day of —— duly filed in the matter of the estate of C D, deceased, his petition to have the court ascertain and declare the rights of all persons to said estate, and to all interests therein, and to whom distribution thereof should be made, and the court upon the filing of said petition having duly made an order that service of a notice upon all persons known and unknown claiming an interest in the estate of C D, deceased, be made to appear within the time designated in said order, and within the time prescribed by law to exhibit their respective claims of heirship, ownership, or interest in said estate of C D, deceased; and it appearing to the satisfaction of the court that such notice has been duly given and served as required by law and the order of this court, and the court having duly entered a decree establishing proof of the service of such notice; and said A B claiming to be one of the heirs of C D, deceased, and entitled as such to a distributive share of his estate, having duly filed his complaint in the proceeding, and duly served a copy of the same on each person who has filed his written appearance in the action, and the defendants, M N, O P, and Q R, having duly filed their answers [and the default of S T, who had duly filed his appearance in the proceeding, but failed to answer the said complaint within the time required by law having been duly entered, and the default of all persons known and unknown who have failed to appear, hav-

ing been duly entered], and the matter coming on regularly to be tried by the court, G H, Esq., appearing as the attorney for the plaintiff A B, and I J, Esq., appearing as attorney for the defendants M N, O P and Q R; and evidence having been introduced, and the matter having been argued by the attorneys of the respective parties, and submitted to the court, the court finds that C D died intestate, and that he left him surviving no wife, or father, or mother, and no child or descendant, and that he has no child or descendant;

That A B, the plaintiff, is the only son and descendant of K L, a brother of C D, said deceased, and that said K L died in the lifetime of C D, said deceased. [And so on in respect to each person who has answered in the proceeding, showing how he has an interest in the estate. And if any of the defendants have no interest in the estate, the facts by which this is shown should be found.]

And the court finds as conclusions of law:

That the plaintiff A B is an heir of C D, deceased, and is entitled as such to an undivided ——— of his estate; [and insert proper conclusions of law from the facts found as to each defendant's claim].

IT IS THEREFORE ADJUDGED AND DECREED that said C D died intestate, and the plaintiff A B is an heir of C D, the deceased, and is entitled to distribution to him of ——— of the estate of C D, deceased, which shall be distributed; [and in a like manner as to each of the defendants.]

IT IS FURTHER ADJUDGED AND DECREED that the costs of this proceeding are apportioned as follows: [State how.]

[*Date.*]

———,

Judge.

If the estate of a decedent be distributed to two or more persons in common and undivided, it can be partitioned by proceedings in the probate court if the estate has not been closed in that court.

FORM NO. 346.

PETITION FOR THE PARTITION OF THE ESTATE OF A DECEDENT.

[*Title of Proceeding.*]

A B petitions the court and alleges and shows that C D died intestate, and that your petitioner is an heir of the decedent, and is entitled to a distributive share of his estate;

That K L and M N are also heirs of said C D, deceased, and each of them is entitled to a distributive share of the estate of C D, deceased;

That said estate is ready for distribution to [or has been distributed to] your petitioner and said K L and M N, and the respective shares of your petitioner and said K L and M N, in said estate, will be assigned [or has been assigned] by the decree of distribution of said estate to him and them in common and undivided and not separated or distinguished;

That it will be for the best interests of all persons interested in said estate that said estate so distributed [or when distributed] be partitioned, and that the share of each person interested in said estate be set out to him in severalty.

WHEREFORE your petitioner prays that three disinterested persons be appointed by the court commissioners to make such partition.

G H,
Attorney for the Petitioner.

FORM NO. 347.

NOTICE OF PETITION IN PROBATE PROCEEDINGS FOR THE PARTITION OF THE ESTATE OF A DECEDENT.

[*Title of Proceeding.*]

NOTICE.

To K L and M N, and to all persons who are interested in the estate of C D, deceased:

You are notified that A B, one of the heirs of C D, deceased, has petitioned the court to appoint three disinterested persons as commissioners to partition, divide, and set out in severalty to each of the heirs of said decedent so much of the property of

the estate of said decedent to be distributed as will be equal in value to the share of such estate to which such heir is entitled.

You are further notified that said petition will be presented to the court for action thereon, on the — day of ——, at — o'clock — m.

[*Date.*] G H,

Attorney for A B.

This petition may be filed and the notice given before decree of distribution, but the commissioners must be appointed after such decree. The notice may be served personally, or by public notice, as the court may direct; by consent of the parties, or when the court deems it proper and just, one commissioner only may be appointed.

No decree of distribution will divest the court of jurisdiction to order partition, unless the estate is finally closed. C. C. P., section 1668.

A certified copy of the order of the appointment of the commissioners and of the decree assigning and distributing the estate, must be issued to them as their warrant; and their oath that they will faithfully discharge their duties must be endorsed thereon.

Before partition is made by the commissioners, notice must be given to all persons interested in the partition of the time and place when and where they will proceed to make the partition, and the commissioners may take testimony, order surveys, and take such other steps as may be necessary, to enable them to form a judgment upon the matters before them.

FORM NO. 348.

ORDER OF COURT APPOINTING COMMISSIONERS TO MAKE PARTITION.

[*Title of Proceeding.*]

A B, one of the heirs of C D, deceased, having filed his petition asking the court to appoint three disinterested persons commissioners to partition and set out in severalty to each person interested in the estate of C D, deceased, the portion of the property of the estate of said decedent to which he is entitled, and due notice of the hearing of such petition having been given, and the court having made an order and decree of distribution, showing the share in the property of the estate of said decedent to which each of his heirs is entitled, and such shares having been distributed in common and undivided, and not being separated and distinguished; and said matter coming on regularly to be heard on the — day of ——, G H, Esq., appearing as attorney for the petitioner A B, and I J, Esq., appearing as attorney for K L and M N;

IT IS ORDERED that O P, Q R and S T, three disinterested persons, be and they are appointed commissioners to partition and set out in severalty to each person entitled to a distributive share of the estate of C D, deceased, such portion thereof as will be equal in value to his distributive share thereof, and to perform other duties of such commissioners as required by law.

[*Date.*]

_____,
Judge.

When the petition is made by a devisee, legatee, or other person in interest, the facts which would give the petitioner the right to have the commiss'oners appointed should be stated in a manner similar to the statement of the facts in such petition by an heir.

If the commissioners, or commissioner, partition the real estate and personal property, or either, among the heirs at law, or the devisees or legatees of a decedent, or other persons entitled thereto, the several shares therein must be set out to each individual in proportion to his right; and if the estate partitioned be real estate it must be partitioned and set out to each party entitled thereto by metes and bounds in proportion to his right; and if it be personal property it must be partitioned and set out to each person entitled thereto in proportion to his right, so that the same can be easily distinguished; unless two or more of the parties interested consent to have their shares set out so as to be held by them in common and undivided.

But if the real estate cannot be divided without prejudice or inconvenience to the owners, the court may, on the filing of the report of the commissioners, or commissioner, if it appear just and proper, confirm the report and assign the whole thereof to one or more parties entitled to a share therein, who will accept it, preferring the males to the females, and among children, preferring the elder to the younger.

The parties, or party, accepting the whole must pay to the parties interested their just proportion of the true value thereof, or secure the payment of the same to their satisfaction; and the value of the estate must be ascertained and reported by the commissioners or commissioner.

The commissioners, or commissioner, in partitioning real estate, may partition and divide in severalty to one of the parties interested, real estate, which is greater in value than his share in the estate of the decedent, on his paying to the others interested such sums as the commissioners, or commissioner, award to make the partition equal; and on the filing of the report of the commissioners, or commissioner, the court, if it appear just and proper, will confirm such report.

If the commissioners report, and it appear to the court from such report, and from evidence, that property of the estate cannot be otherwise fairly divided, and should be sold, and the net proceeds of the sale be divided, the court may, if the report be confirmed, order such property sold by the executor or administrator or a commissioner appointed by the court, and the net proceeds divided among the parties interested; such sale to be made and the sale reported to and confirmed by the court (if confirmed by the court), in the manner as in the case of other sales by an executor or administrator of the property of the estate of a decedent.

When the report of the commissioners, or commissioner, is filed, and the time of the hearing of the report is fixed by the court, and due notice of such hearing is given, the court on such hearing may confirm the report, or set it aside, and commit the matter to the same commissioners, or appoint other commissioners

If the court confirm the report and the commissioners have partitioned land, a certified copy of the judgment of confirmation must be recorded in the county where the land lies.

FORM NO. 349.

DECREE OR JUDGMENT CONFIRMING THE REPORT OF THE COMMISSIONERS.

[*Title of Proceeding.*]

A B, one of the persons interested in the estate of C D, deceased, having petitioned the court to appoint three disinterested persons commissioners to partition and set out in severalty, to each person interested in the real estate of C D, deceased, by metes and bounds, a portion of said real estate which is in proportion to his right in said estate, and O P, Q R and S T, three disinterested persons, having been duly appointed for that purpose, and said commissioners having been duly and regularly sworn to faithfully discharge their duties, and said commissioners having examined such real estate, and made partition thereof among the persons interested in said estate in proportion to their respective rights, and having filed their report, and the court having fixed the time for the hearing of said report, and having directed that notice thereof be given to all persons interested in said estate, and it having been proven to the satisfaction of the court that such notice has been given as required by law, and as directed by the court, and said matter coming on regularly to be heard by the court on the — day of ——; G H, Esq., appearing for the petitioner A B, and I J, Esq., appearing for K L and M N, who are interested in said estate of C D, and evidence having been introduced, and the matter having been argued by counsel, and submitted to the court, the court finds that the report of the commissioners is just and correct, and should be confirmed;

IT IS THEREFORE ADJUDGED AND DECREED that said report be and the same is confirmed.

IT IS FURTHER ADJUDGED AND DECREED that the real estate of the estate of C D, deceased, namely, [describe the real estate] be and it is partitioned, and a portion thereof be and is set out in severalty, and to be his separate property, to each of the persons interested in the estate of C D, deceased, as follows, namely:

To the petitioner A B, [describe his portion].

To K L, [describe his portion].

To M N, [describe his portion].

AND IT IS FURTHER ADJUDGED AND DECREED that a certified

copy of this judgment, attested by the clerk, under the seal of the court, be recorded in the county of ———, where the lands partitioned lie.

[*Date.*] ————,

Judge.

When any estate of a decedent other than money be distributed to a person residing out of the state, and who has no agent in the state, the court may appoint a person, a resident of this state, to be the agent of such person for the purpose of taking charge of the portion of the estate of the decedent, which is distributed to such person, as well as to act for such absent person in the distribution of the estate of the decedent.

FORM NO. 350.

ORDER APPOINTING AN AGENT FOR AN ABSENT HEIR IN THE MATTER OF THE DISTRIBUTION OF THE ESTATE OF A DECEDENT.

[*Title of Proceeding.*]

It appearing to the court that E F, a person interested in the estate of C D, deceased, is absent from this state, and that he has no agent residing in this state, the court appoints G H, the agent for said E F, to represent him, and authorizes said G H as such agent to act for said E F in the distribution of the estate of C D, deceased, and to take possession and charge of the portion of the estate which may be distributed to said E F; and it is ordered that before G H act as such agent he give a bond to the state of California in the sum of ——— dollars, to be approved by the court, or by a judge thereof, conditioned that he shall faithfully manage and account for the estate distributed to said E F.

[*Date.*] ————,

Judge.

FORM NO. 351.

DECREE OF FINAL DISCHARGE OF AN EXECUTOR OR ADMINISTRATOR.

[*Title of Proceeding.*]

It appearing to the court that said estate has been fully administered and the court having been shown by the executor

[or administrator] by the production and filing of satisfactory vouchers, that A B, the executor of the will [or the administrator] of the estate of C D, deceased, has paid all sums of money due from him, and has delivered up, under the order of the court, all the property of the estate to the parties entitled, and has performed all the acts lawfully required of him;

IT IS ORDERED, ADJUDGED, AND DECREED that A B, said executor [or such administrator] be and he is discharged from his trust as such executor [or administrator], and he and his sureties are discharged from all liability to be incurred hereafter.

[*Date.*] ———,

Judge.

FORM NO. 352.

PETITION BY A MINOR OF THE AGE OF FOURTEEN YEARS AND UPWARD TO HAVE A GUARDIAN APPOINTED FOR HIS PERSON AND PROPERTY.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN THE COUNTY OF ———.

In the matter of the guardianship of the person and estate of A B, a minor.

A B petitions this court, and alleges and shows:

That he is an inhabitant and resident of said county of ———, and that he has estate within the state of California, and that he is of the age of ——— years, and that he has no guardian appointed by will or deed;

That his property in the state of California consists of [state what the property is and its probable value];

That your petitioner resides with C D, who is his mother, and who is a suitable person to be his [or her] guardian, and who has consented in writing that she will, if appointed by this court, qualify and act as such guardian.

That the only other relatives which your petitioner has in this county are E F, an uncle, and G H, an aunt, [and they have consented in writing that said C D be appointed guardian of your petitioner].

WHEREFORE, your petitioner prays this honorable court to

appoint said C D guardian of the person and estate of your petitioner.

[*Date.*] A B,
Petitioner.

[*Duly verified.*]

WRITTEN CONSENT OF MOTHER.

I consent that if appointed the guardian of my son, A B, I will qualify and act as such guardian.

[*Date.*] C D,

We consent that C D, the mother of said A B, a minor, be appointed his guardian.

[*Date.*] E. F,
G H.

FORM NO. 353.

PETITION OF A RELATIVE OR OTHER PERSON FOR THE APPOINTMENT OF A GUARDIAN OF A MINOR WHO IS UNDER THE AGE OF FOURTEEN YEARS.

[*Title of Proceeding.*]

A B, your petitioner, makes this petition on behalf of said C D, said minor, and alleges and shows:

That he is an uncle [or a friend] of said C D, who is a minor of the age of ——— years, and who is a resident of said county of ———, [or who is a non-resident of the state of California, and has property in the said county of ———]; and who has no guardian appointed by will or deed;

That the property of said minor in the state of California consists of [describe briefly the property and state its probable value].

That said minor resides with E F in this county, and his only relatives who reside in this county are [state their names and relationship to minor] [or said minor resides with E F, in ———, in the state of ———];

That your petitioner has knowledge of the property of the minor in this state, and is qualified to manage and care for the same; [and for said minor]

That E F, the person with whom said minor resides, and ——— and ———, his only relatives who reside in this county, have consented in writing that your petitioner be appointed guardian of said minor.

WHEREFORE your petitioner prays that your petitioner be appointed guardian of the person and estate of said minor; [or of the estate of said minor in this state].

[*Date.*] A B.

[*Duly verified.*]

If the person with whom the minor resides, and his relatives who reside in the county, do not consent to the appointment of the petitioner as guardian, as prayed for, or if some of them do not consent, the allegation of their consent, except of the consent of those who do consent, should not be in the petition. The consent may be on the petition, or in a separate document, which should be filed.

When the petition is filed and presented the court or a judge thereof must determine whether any, and if any, what notice should be given to the person with whom the minor resides, and to the minor's relatives who reside in the county, and who have not consented to the appointment as asked for; and the court or the judge thereof should set a time for a hearing of the petition, and direct that notice thereof be given. If the court or the judge thereof should determine that no notice need be given, it may on the allegations and evidence on the part of the petitioner, appoint the guardian immediately.

FORM NO. 354.

ORDER GRANTING LETTERS OF GUARDIANSHIP.

[*Title of Proceeding.*]

A B having filed and presented to the court his petition praying that he be appointed the guardian of the person and estate of said C D, who is a minor of the age of ——— years; and the person with whom such minor resides, and the relatives of said minor who reside in this county, having consented to the appointment of said A B as such guardian; [or the court having fixed the — day of —— at —— o'clock — m., for the hearing of said petition, and having directed notice thereof to be given to the person with whom the minor resides, and his relatives who reside in the county, and it having been satisfactorily proven to the court that such notice has been given as directed by the court]. and the said petition coming on regularly to be heard on this — day of ——, and the court having heard the allegations and proofs of all persons interested, and the court finding that all the allegations in said petition are true;

IT IS ORDERED AND DECREED that A B be, and he is appointed guardian of the person and estate of C D, said minor, and that letters of guardianship of the person and estate of said C D, said minor, be and they are granted to said A B; and that they be

issued to him on his giving to said C D, said minor, a bond with sufficient sureties, to be approved by a judge of this court, in the sum of ——— dollars; and that the oath of A B, as such guardian, be endorsed on said letters.

[*Date.*]

———————

Judge.

The bond of the guardian should be similar to the bond of an executor (or administrator), and the condition in such bond must be that the guardian will faithfully execute the duties of his trust according to law.

The court should at the time of granting the letters of guardianship appoint three appraisers of the property of the ward.

The inventory and appraisement of the property of a ward should be made and returned within three months after the appointment of the guardian.

FORM NO. 355.

ACCOUNT OF A GUARDIAN.

[*Title of Proceeding.*]

A B, the guardian of C D, a minor, renders this account under oath, of the property, estate, and moneys of his said ward in his hands and of all the proceeds thereof, and of interests derived therefrom, and files therewith a statement of the management and disposition of the same;

A B as guardian, in account with C D, a minor, his ward:

DR.

Date		Dollars	Cents
	To cash which he received on assuming the duties of said guardian from ———		
	To cash received from rents from —— for real estate leased by him ..... (And so on as to all the money of the ward received by the guardian)		
	TOTAL, ...		

			Cr.	
Date		Voucher No.	Dollars	Cents
	By cash paid clerk of the court for fees, ...			
	By cash paid ——— for the board and the care of said ward for a period of —— months ending on the — day of ——, ... (And so on until all the moneys paid out by the guardian for said ward have been stated.)			
	By cash in the hands of said guardian, ... (This cash should balance the money account.)			
	TOTAL, ...			

And with this account said guardian states that he has received in his possession as such guardian, aside from said money, property of said minor of which the following is a description; [describe the property particularly, and its probable value] and that he has managed said property as follows, namely, [state how such property has been managed].

[*Date.*] A B.

Guardian.

[*Duly verified.*]

This account should be rendered within three months after the appointment of the guardian and another account of the guardian should be rendered upon the expiration of one year from the time of such appointment, and an account of such guardian should be rendered annually thereafter; and if the estate of the ward exceeds in value $100,000, semi-annual returns of the condition, management and disposition of the property of the ward should be made to the court.

FORM NO. 356.

PETITION FOR THE APPOINTMENT OF A GUARDIAN FOR AN INSANE, OR AN INCOMPETENT PERSON.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN THE COUNTY OF ———.

In the matter of the guardianship of the person and estate of C D, an insane [or an incompetent person].

A B petitions the court and makes application for the

appointment of a guardian for the person and estate of C D, who is an insane [or an incompetent] person, and alleges and shows in support of said petition:

I. That your petitioner is a relative [or friend] of said C D;

That said C D is a resident of the county of ———, in the state of California; is of the age of ——— years, and is insane, [and as such has been committed to and is confined in a state hospital], [or he is in feeble health, and his mind is enfeebled by age and sickness, and that he is thereby mentally incompetent to manage his property].

WHEREFORE your petitioner prays that a guardian of the person and estate of said C D be appointed bv this court.

[*Date.*]

A B,
Petitioner.

[*Duly verified.*]

FORM NO. 357.

ORDER MADE ON THE FOREGOING PETITION.

[*Title of Proceeding.*]

It having been represented to this court [or a judge of this court], by the verified petition of A B, that said C D is insane [or is mentally incompetent to manage his property], it is ordered that ———, the — day of ——, at ——— o'clock — m., and the court room [No. —] of this court be, and the same are fixed as the time and place for hearing said petition, and that notice thereof, with a copy of said petition thereto attached, be served on said C D at least five days before said time so fixed for such hearing, and that said C D, if able to attend, be produced on such hearing.

[*Date.*]

———,
Judge.

At the time and place fixed for said hearing, if a return be made showing the service of such notice as directed by said order, or at such other time, to which the hearing may be continued, the court should hear and examine the case, and make its order and decree therein.

FORM NO. 358.

ORDER APPOINTING A GUARDIAN FOR AN INSANE, OR AN INCOMPETENT PERSON.

[*Title of Proceeding.*]

This matter coming on regularly to be heard by the court on the — day of ——, and it having been proven to the satisfaction of the court that the service of the notice of such hearing and of the time and place thereof, and of a copy of the petition attached thereto, have been made on said C D, as required by law, and the order of this court; [and such hearing having been regularly continued to this time], and the said C D having been produced in court at the hearing, [or it appearing to the court that said C D is not able to attend at the hearing], and evidence having been introduced, and after a full hearing and examination upon said petition, it appearing to the court that the allegations in the petition of A B are true, and that said C D is mentally incapable of taking care of himself, and managing his property;

IT IS ORDERED AND DECREED that A B be and he is appointed the guardian of the person and estate of said C D, with the powers and duties specified in Chapter XIV of Title XI of Part III of the Code of Civil Procedure; and that letters of guardianship be granted to him; and that they be issued to him on his executing, with sufficient sureties, a bond to said C D in the sum of ——— dollars, to be approved by a judge of this court; and on his taking an oath as such guardian to be endorsed on such letters; and that ——— and ——— and ——— be and they are appointed appraisers of the property of said C D.

[*Date.*]

———,

Judge.

The bond of such guardian, the inventory and appraisement returned by him and his accounts, should be similar to the bond to be given, the inventory and appraisement to be made and returned, and the accounts to be filed by a guardian of a minor.

A person who has been declared by the court to be insane or incompetent, or the guardian of such person, or any relative of such person within the third degree, or a friend of such person, may apply by a verified petition to the Superior Court of the county by which he was declared insane or incompetent, to have the fact of his or her restoration to competency judicially determined; and in such proceeding, issues of fact raised, must, if the petitioner request it, be determined by a jury. C. C. P. Sec. 1766.

Proceedings for the sale by the guardian of the property of any ward may be similar to the proceedings of the sale, by an executor (or administrator) of the property of the estate of a decedent.

Before such sale of real property of the ward is made the guardian must give a bond to the ward in an amount fixed by the court, conditioned that such guardian will sell such real property, and account for the proceeds of the sale, and faithfully execute the duties of his trust according to law.

FORM NO. 359.

PETITION OF A GUARDIAN FOR THE GRANTING OF AN ORDER FOR THE SALE OF REAL ESTATE OF THE WARD.

[*Title of Proceeding.*]

A B, as the guardian of the person and estate of C D, a minor, [or an insane person] [or an incompetent person], petitions the court to grant an order for the sale of real property of C D, said ward of petitioner, and alleges and shows:

I. That said ward is of the age of ——— years and upwards, and is under the age of ——— years; [or said ward is an insane or incompetent person];

II. That on the — day of ———, by an order of this court, which was duly given and made, your petitioner was appointed the guardian of the person and estate of C D, petitioner's said ward, and your petitioner qualified as such guardian, and thereafter letters of such guardianship were issued to your petitioner, and his oath as guardian was endorsed on said letters; and your petitioner has been ever since the issuance of such letters, the guardian of the person and estate of C D, said minor; [or said insane person] [or said incompetent person];

III. That your petitioner has since the issuance to him of such letters taken into his possession, and has managed, all the estate of his said ward of which he has knowledge, and has returned and filed a just and true inventory thereof;

IV. That the value of the personal property of his said ward so received by your petitioner, did not exceed ——— dollars, and he has under the orders of this court disposed of such personal property [or all of such personal property with the exception of personal property of the value of ——— dollars], and he has applied the net proceeds therefrom, and the net proceeds from the income and profits from the real estate of his said ward towards the [education and] support of said ward, and has rendered to this court correct statements and accounts of his

receipts from the property of said ward, and his expenditures in behalf of said ward; and said accounts as so rendered have been allowed and approved by the court and are referred to;

V. That the only money of the estate of said ward which there now is remaining is the sum of ——— dollars; and the only real estate of said ward which has come to the knowledge of your petitioner, and the condition and value of, and the income from each portion of said real estate, are as follows, namely:

1st. A tract of land consisting of about ——— acres, described as [describe the land], which is of the value of about ——— dollars, and which is improved and cultivated, and produces an annual net income of about ——— dollars.

2nd. A tract of land of about ——— acres, which is of the value of about ——— dollars, and which is described as [describe it], and which is wholly unimproved and uncultivated, and which produces no net income whatever.

VI. That it will be necessary for the comfortable maintenance and support of said ward that said unimproved and uncultivated tract of land secondly above described, be sold and the proceeds of such sale be used for his ward's maintenance and support. [Or it will be for the benefit of said ward, that said unimproved and uncultivated tract of land secondly above described, be sold, and that proceeds of such sale be put out at interest for the benefit of said ward]; [or that the proceeds of such sale be invested in some productive stock]; [or, and that the proceeds of such sale be used in the improvement of the other real estate of said ward, which requires to be improved]; [state how.]

[VII. That said real estate which this petitioner asks for the granting of an order for the sale of, can be sold for a higher and better price at private sale, than it could be sold for at public auction.]

WHEREFORE your petitioner prays that an order for the sale of said unimproved and uncultivated tract of land which is described as [describe the land] be granted, and that such sale be at public auction [or at public auction or private sale as your petitioner shall judge to be most beneficial to said ward]; and

that the net proceeds of such sale be used for the benefit of such ward as this honorable court may direct.

A B,
Guardian.

[*Duly verified.*]

FORM NO. 360.

ORDER OF COURT TO SHOW CAUSE WHY A GUARDIAN SHOULD NOT BE GRANTED AUTHORITY TO SELL REAL ESTATE OF HIS WARD.

[*Title of Proceeding.*]

It appearing to the court, from the verified petition of A B, the guardian of the person and estate of C D, a minor [or an insane person] [or an incompetent person], that it is necessary [or would be beneficial to his ward] that the following described real estate of his ward be sold, namely, [describe the land petitioned to be sold];

IT IS ORDERED that the next of kin of said ward, and all persons interested in the estate so petitioned to be sold, appear before the court on the — day of ——, at ——— o'clock — m., to show cause why an order should not be granted for the sale of said real estate;

AND IT IS FURTHER ORDERED that a copy of this order be served personally on the next of kin of C D, said ward, and on all persons interested in the said estate petitioned to be sold at least fourteen days before said — day of ——.

[Or it is ordered that a copy of this order be published in the ———, a newspaper printed in the county of ———, in this state, at least once a week for three successive weeks next before said — day of ——.]

[*Date.*]

———————,
Judge.

If the written consent to the making of the order of sale be subscribed by all persons interested therein and by the next of kin of the ward, notice of the order need not be served or published.

Forms in respect to the sale of the real estate of a decedent in probate proceedings will be some guide in respect to the sale of the real estate of a ward.

Before personal property of a minor can be sold by the guardian, a petition for the granting of an order for such sale should be filed, and an order to show cause should be made, and notice of such order should be served or published unless consent to the making of the order be subscribed by the next of kin of the ward, and by all persons interested in the property to be sold.

FORM NO. 361.

PETITION OF EXECUTOR, ADMINISTRATOR, OR GUARDIAN TO MORTGAGE REAL ESTATE.

[*Title of Proceeding.*]

A B petitions the court and alleges:

That your petitioner is the executor of the will [or the administrator of the estate] of C D, deceased, [or the guardian of the person and estate of C D, a minor], [or an incompetent person]; and that letters testamentary, [or of administration] [or of guardianship], were granted by this court to your petitioner, and were issued to him, as such executor [or administrator] [or guardian], on the — day of ——; and that such letters have not been revoked;

That your petitioner proposes, if authorized so to do by this court, to execute as such executor, [or administrator] [or guardian], a note or notes, and for the purpose of securing the payment of the same to mortgage real estate, the property of the estate of C D, deceased, [or the real estate of C D, his said ward]; and the purpose for which he proposes to do this is to raise money thereby for the purpose of paying a mortgage which was given to secure the payment of the sum of ——— dollars, and which is now a lien upon real property of the estate of said decedent, [or on the real estate of said ward]; and that said mortgage is now due, and that E F, who is the owner and holder of said mortgage threatens to foreclose the same, unless said mortgage be paid, and will by such foreclosure proceedings when commenced, cause great loss to the estate of said decedent [or to the estate of your petitioner's said ward]; and that your petitioner has no funds of the estate of said decedent [or of your petitioner's said ward], with which to pay said mortgage; [or state any other purpose for which it is proposed to make such note and mortgage];

And that your petitioner proposes to use the funds which may be raised by said proposed mortgage to pay off said mortgage owned and held by said E F, [or state for what other purpose it is proposed to use the funds to be raised by said proposed note and mortgage];

That the advantages which will accrue to the estate of said decedent [or to the estate of your petitioner's said ward], will

be, that with the funds raised by said proposed note and mortgage, your petitioner can and will pay off said mortgage owned and held by said E F, and thereby will save the estate of said decedent [or of your petitioner's ward], the large costs and expense of such foreclosure proceedings; and that the actual value of the premises mortgaged by said mortgage to E F exceeds the amount of said mortgage, and that if said mortgaged property be sold under and by virtue of said foreclosure proceedings, your petitioner will have no funds to redeem it within the statutory time for such redemption; and that if said proposed mortgage be made, your petitioner will have funds with which to pay the same. [Or state any other reasons why it would be of advantage to make such proposed note and mortgage.]

That the amount to be raised by said proposed mortgage is the sum of ——— dollars, and the property proposed to be mortgaged is [describe the property].

That the names of the legatees and devisees of said decedent are [give the names] [or the names of the heirs of said decedent so far as known to your petitioner are] [give the names] [or the name of said minor [or incompetent person] is — state the name.]

A B,

Signature of Attorney for Petitioner. [*Duly verified.*]

Executor [*or Administrator*] [*or Guardian.*]

FORM NO. 362.

ORDER TO SHOW CAUSE MADE ON THE FOREGOING PETITION.

[*Title of Proceeding.*]

On filing the petition of A B, as the executor of the last will [or as the administrator of the estate] of C D, deceased, [or as the guardian of the person and estate of C D, a minor] [or an incompetent person], IT IS ORDERED by said court [or by Hon. ———, a judge of said court], that all persons interested in the estate of C D, deceased, [or in the estate of C D, a minor] [or incompetent person], be and they are required to appear before said court on the — day of ——, at ——— o'clock — m., at the

court room [No. —] of said court, then and there to show cause why the realty [describing it], or some part thereof, should not be mortgaged for the sum of ——— dollars mentioned in said petition or such lesser amount as to the court shall seem meet; and said petition on file is referred to for further particulars;

AND IT IS FURTHER ORDERED that this order be served personally on all persons interested in said estate for at least ten days before the time appointed for hearing the petition, [or by the publication thereof, at least once a week for four successive weeks in the ———, a newspaper of general circulation published in the county of ———, in this state, next before the time appointed for such hearing.]

[*Date.*]

———,
Judge.

FORM NO. 363.

ORDER AND DECREE AUTHORIZING THE MORTGAGING OF REAL ESTATE OF A DECEDENT OR OF A WARD.

[*Title of Proceeding.*]

A B, as the executor of the last will [or as the administrator of the estate] of C D, deceased [or as the guardian of the estate of C D, a minor] [or incompetent person], having filed his petition for an order of this court authorizing him as such executor, [or as such administrator] [or as such guardian], to mortgage real estate of said decedent [or of said minor] [or of said incompetent person], and an order to show cause having been duly made by this court, and the court having received satisfactory proof of the personal service [or of the service by publication] of said order to show cause, upon all persons interested in said estate, as directed by said order, and on this — day of ——, the time and place appointed in said order [or the time to which the hearing of the matter has been duly continued] said matter coming on regularly to be heard, and the court having heard said petition, and the objections filed and presented thereto [or there being no objections thereto], and evidence having been introduced and considered by the court, and after a full hearing of the petition, [and of the objections thereto] the court being satisfied, and finds that it will be for the advantage and best interest of said

estate of C D, deceased [or of the said estate of C D, said minor] [or incompetent person] and of those interested therein, to mortgage the following portion of said estate, namely, [describe the portion to be mortgaged] to secure a loan of ——— dollars in gold coin of the United States;

IT IS ORDERED, ADJUDGED, AND DECREED that said executor [or administrator] [or guardian] be, and he is authorized, empowered, and directed to borrow the sum of ——— dollars, and to execute a promissory note [or notes] therefor, and to mortgage, to secure the payment of said promissory note [or notes], the following described real property, namely, [describe it] the property of the estate of said decedent [or minor] [or incompetent person]; that said loan must be for the period of ——— years, and in gold coin of the United States, and the maximum interest to be paid on the loan must not exceed ——— per cent. per annum, [and the buildings in the mortgaged property must be insured for the further security of the lender of the money;] and that the interest and the principal of said loan be paid out of the whole estate of the decedent [or ward], or out of the mortgaged property.

A certified copy of the above order must be recorded in the office of the county recorder of every county in which the land so to be mortgaged, or any part thereof, lies.

FORM NO. 364.

PETITION TO LEASE THE REALTY OF THE ESTATE OF A DECEDENT, OR OF A MINOR, OR OF AN INCOMPETENT PERSON.

[*Title of Proceeding.*]

A B, as the executor of the last will [or as the administrator of the estate] of C D, deceased, [or as the guardian of the person and estate] of C D, [a minor] [or an incompetent person] petitions the court, and alleges and shows:

That he as such executor [or administrator] [or guardian] is in possession, through a tenant [or if otherwise state how] of the [describe the property], which is a part of the property of the estate of said decedent [or of said minor] [or of said incompetent person];

That said real property can be leased for the monthly rent

of ——— dollars [or state on what other terms said property can be leased], and unless so leased, said property will yield little income to said estate of C D, deceased [or to said minor] [or to said incompetent person];

That it is proposed by your petitioner to lease said property for the term of ———, at a monthly rent of ——— dollars, payable in gold coin, [or if for other rental, state what], and [state other conditions of the proposed lease];

That the names of the legatees and devisees of said decedent [or the heirs of said decedent] are [give names]; [or the name of said minor] [or of said incompetent person] is ———.

WHEREFORE your petitioner prays for an order authorizing, empowering, and directing your petitioner as such executor [or administrator] [or guardian] to lease said real estate for such term and rental, and on the conditions which the court in said order may direct.

A B,
Executor [*Administrator*]
[*or Guardian.*]

G H,
Attorney for Petitioner.
[*Duly verified.*]

FORM NO. 365.

ORDER OF COURT TO SHOW CAUSE WHY SUCH REAL PROPERTY SHOULD NOT BE LEASED.

[*Title of Proceeding.*]

A B, as the executor of the last will [or as the administrator of the estate] of C D, deceased, [or as the guardian of the estate of C D, a minor, or an incompetent person], having filed his petition asking the court to authorize, empower, and direct him to lease [describe the property], which is a part of the estate of C D, said decedent [or of said minor] [or of said incompetent person];

IT IS ORDERED that all persons interested in said estate, are required to appear before the court on the — day of ——, at ——— o'clock — m., at the court room [No. —] of said court, then and there to show cause why the real property above

described should not be leased by said executor [or administrator] [or guardian] for the period of ———, at the rental of ———, mentioned in said petition, and said petition is referred to for further particulars.

AND IT IS FURTHER ORDERED that this order to show cause be personally served on all persons interested in said estate at least ten days before said time appointed for hearing said petition; [or that this order be published at least once a week for two succcessive weeks next before the time fixed for said hearing, in ———, a newspaper of general circulation published in said county of ———].

[*Date.*]

————————,
Judge.

FORM NO. 366.

ORDER AND DECREE AUTHORIZING THE LEASING OF REAL ESTATE OF A DECEDENT, A MINOR, OR AN INCOMPETENT PERSON.

[*Title of Proceeding.*]

A B, as the executor of the last will, [or as the administrator of the estate] of C D, deceased, [or as the guardian of the estate of C D, a minor, or an incompetent person], having filed his verified petition, asking for an order of the court authorizing, empowering, and directing him as such executor [or administrator] [or guardian] to lease the [describe the real property], a part of the estate of said decedent [or minor] [or incompetent person]; and the court having duly made an order that all persons interested in said estate show cause why the prayer of said petitioner should not be granted; and said petition coming on regularly to be heard on the — day of —— in the court room of the court, the time and place appointed in said order to show cause [or the time and place to which the hearing was duly continued], and the court having first received satisfactory proof of personal service, [or of the service by publication], of said order to show cause, as directed in said order; and the court having heard said petition and all objections that have been filed and presented thereto [or there being no objections presented thereto], and the court having heard and considered the evidence produced,

and after a full hearing, the court is satisfied, and finds that it will be to the advantage of the estate of said C D to lease the whole of the above described real estate;

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that said executor [or administrator] [or guardian] be and he is authorized, empowered, and directed to lease the above described real estate for the term of ——— years for a rental of not less than ——— [state the minimum rental]; and on the terms and conditions following, namely, [state the terms and conditions so prescribed].

[*Date.*]

———,

Judge.

The court is not required to state the terms and conditions other than the time for which the lease is to be made and the minimum rental therefor. The term for which the property is to be leased cannot exceed five years, and a certified copy of the order authorizing and directing the leasing of the property must be recorded in each county in which the property or some part thereof lies.

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ERRATA.

Page 193, for last clause of second paragraph, read "and an appeal from such interlocutory judgment can be taken."
Page 201, line 22, for "party" read "parties."
Page 214, line 12, for "executor" read "execution."
Page 244, line 25, for "given" read "give."
Page 257, line 25, for "effected" read "affected."
Page 291, for "by," first word of line 16, read "on."
Page 312, line 21, for "speed" read "speedy."
Page 312, line 25, for "is" read "are."
Page 315, line 19, for "hereof" read "thereof."
Page 336, line 26, omit "was."
Page 374, line 1, for "devisee" read "devise."
Page 419, line 5, for "C F" read "E F."

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